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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,) 10-CV-569(RJA)
Plaintiff)
vs.)
MARK ELLIOT ZUCKERBERG and) Buffalo, New York
FACEBOOK, INC.,) December 13, 2011
Defendants.) 12:11 p.m.
- - - - -X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

AUDIO RECORDER: Sandra D. Wilson

TRANSCRIBER: Christi A. Macri, FAPR, RMR, CRR, CRI
Kenneth B. Keating Federal Building
100 State Street
Rochester, New York 14614-0222

(Proceedings recorded by electronic sound recording,
transcript produced by computer).

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* * *

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P R O C E E D I N G S

* * *

CLERK: Ceglia vs. Zuckerberg and
Facebook.

Appearing for the Plaintiff is Dean
Boland.

And appearing for the Defendant is Orin
Snyder, Amanda Aycock, and Terrance Flynn.

We're here on oral argument on various motions.

MAGISTRATE JUDGE FOSCHIO: Good afternoon. Nice
to see --

MR. BOLAND: Good afternoon, Your Honor.

MAGISTRATE JUDGE FOSCHIO: Welcome to our new
courtroom --

MR. SNYDER: Good afternoon, Your Honor.

MR. BOLAND: Thank you.

MAGISTRATE JUDGE FOSCHIO: Our new courthouse.
Hope it meets with your approvals. We're very proud of it and
rightly so, I think. Well, I know.

We have a number of motions that I think we've all
come to know and love. And I think I'd like to take the first
motion by the plaintiff to strike the memorandum of law, which
was recently filed. That would be number 267, directed to
number 266.

And then I would like to move to the defendants'

1 motions, fourth motion to compel and the motion to strike
2 this -- I would refer to it as the Gianadda matter.

3 Yes, the orders didn't contemplate the defendants'
4 supplemental brief concerning today's hearing, but I don't
5 know how prejudicial it was to the plaintiff to have the
6 benefit of the defendants' view of what was on the table.

7 Certainly it was beneficial to the Court, and
8 unless you feel there's some -- some misstatements in the
9 document or some other form of prejudice that I didn't
10 perceive, it would seem to me that it was a good gesture,
11 thoughtful, helpful and they thought of it first. If the
12 plaintiff had done likewise, I think I would have the same
13 reaction as I had to the defendants' filing.

14 So can you give me a reason why I should just throw
15 it in the wastebasket electronically?

16 **MR. BOLAND:** Shall I go to the podium, Your Honor?

17 **MAGISTRATE JUDGE FOSCHIO:** You either stay where
18 you are or use the podium, whichever you prefer, which is the
19 way we've operated in the past and now that we've got all
20 these wonderful accoutrements, electronic and other pieces of
21 courtroom furniture, we want to make sure you have a chance to
22 use everything that you feel comfortable using.

23 **MR. BOLAND:** Thank you, Your Honor.

24 I stated in the motion you're referring to to
25 strike the basic reasons why we felt it was improper what they

1 had filed. It was in our view --

2 **MAGISTRATE JUDGE FOSCHIO:** It wasn't authorized.

3 And you're right, it wasn't.

4 **MR. BOLAND:** Not only not authorized, but it was
5 actually an attempt -- not attempt. A successful
6 accomplishment of their ability to have what effectively the
7 rules don't allow, which is the last word on our motions.

8 You know, it's motion, response, reply and they
9 said, "no, no, we're not going to follow that. We want the
10 reply and the last word."

11 And I think --

12 **MAGISTRATE JUDGE FOSCHIO:** Well, I'm asking you
13 now. Is there anything in the document that's in error?

14 **MR. BOLAND:** No, Your Honor. And substantively
15 it's the same regurgitation of everything.

16 **MAGISTRATE JUDGE FOSCHIO:** So you're concerned
17 about a possible psychological advantage, is that it?

18 **MR. BOLAND:** No, Your Honor, I'm just looking at
19 it, frankly, this is only the second time I've been before you
20 in oral argument.

21 I filed some motions, we've had phone conferences
22 and if the Court is not put off by these assistant kind of
23 briefs, like you're saying, then that's fine, I don't have an
24 issue with the availability for the plaintiff at some point to
25 maybe offer a brief that's not technically authorized to do

1 the same purpose. That's all.

2 **MAGISTRATE JUDGE FOSCHIO:** Given the numerosity of
3 the motions and their -- in some regards not all, but to some
4 extent complexity, what's the first rule that you learn in
5 your first semester in law school?

6 Make it easy for the judge to decide in your favor.
7 And anything that counsel can offer along that line is welcome
8 as far as I'm concerned, subject to presupposing on the Court.

9 And I see nothing in the document that has that
10 flavor to it. It seemed to me to be, as you now acknowledge,
11 a fairly straightforward summarization of what's on the table.

12 And, again, if you -- and you're apparently not
13 going to press the point any farther, so we can move on,
14 there's nothing in there that is any way prejudicial to the
15 plaintiff's case other than the fact that they made the
16 gesture. And I can assure you that simply making the gesture,
17 that and a buck and a half will get them a cup of coffee at
18 Starbucks perhaps.

19 **MR. BOLAND:** Very well, Your Honor.

20 **MAGISTRATE JUDGE FOSCHIO:** Thank you. All right.
21 So the motion to strike is denied as -- for the reasons
22 stated.

23 And we turn to the defendants' -- I'm not sure what
24 order you want to go in on this one? Do you want to do the
25 Gianadda matter first or do you want to do the fourth motion

1 to compel?

2 **MR. SNYDER:** Yes, Your Honor. Perhaps I can start
3 with the Grant matter because that will only take a moment.

4 **MAGISTRATE JUDGE FOSCHIO:** The 41 floppies.

5 **MR. SNYDER:** Yes, this is our fourth motion to
6 compel, docket number 243, and we set forth in detail the
7 background, which is that the plaintiff has filed numerous
8 false declarations failing to identify a variety of electronic
9 data, including the USB storage devices.

10 **MAGISTRATE JUDGE FOSCHIO:** Just focus on
11 recapitulating your --

12 **MR. SNYDER:** Sure.

13 **MAGISTRATE JUDGE FOSCHIO:** -- point about the
14 so-called Grant --

15 **MR. SNYDER:** Right.

16 **MAGISTRATE JUDGE FOSCHIO:** -- the floppies that are
17 in --

18 **MR. SNYDER:** Yes.

19 **MAGISTRATE JUDGE FOSCHIO:** -- Mr. Grant's
20 possession that were not identified previously as arguably
21 the --

22 **MR. SNYDER:** Yes.

23 **MAGISTRATE JUDGE FOSCHIO:** -- as you argue the
24 plaintiff was obliged to and that -- that you argue that the
25 plaintiff was obliged to identify it previously.

1 **MR. SNYDER:** Yes, Your Honor. Both the July 1st
2 order and the August 18th order directed the plaintiff to
3 identify by name and location all electronic versions of any
4 e-mails, purported e-mails related to this matter.

5 The plaintiff --

6 **MAGISTRATE JUDGE FOSCHIO:** The key word being
7 "all"?

8 **MR. SNYDER:** Yes, Your Honor.

9 **MAGISTRATE JUDGE FOSCHIO:** Thank you.

10 **MR. SNYDER:** On November 17th, the plaintiff for
11 the first time disclosed the existence of a computer forensic
12 expert named Jerry Grant, and electronic versions of the
13 purported e-mails in Grant's possession.

14 That was the first time we had heard of a
15 Jerry Grant. He had not disclosed that.

16 **MAGISTRATE JUDGE FOSCHIO:** When was that again?

17 **MR. SNYDER:** November 17th.

18 **MAGISTRATE JUDGE FOSCHIO:** Right.

19 **MR. SNYDER:** Notably, Mr. Ceglia in his August 29th
20 declaration, which is number 176, concealed the existence of
21 Grant. And this was, of course, a declaration designed to
22 cure his previous non-disclosures and omissions in his prior
23 declarations.

24 This was a plain violation of the Court's orders.
25 We brought this violation to Mr. Boland's immediate attention,

1 and he told us, quote --

2 **MAGISTRATE JUDGE FOSCHIO:** To figure it out for
3 yourself.

4 **MR. SNYDER:** -- "I'm not doing your job. Get one
5 of the thousand lawyers at your disposal to sit and think."

6 **MAGISTRATE JUDGE FOSCHIO:** Do you have a thousand
7 lawyers at your disposal?

8 **MR. SNYDER:** No, Your Honor.

9 **MAGISTRATE JUDGE FOSCHIO:** I didn't think so. I
10 knew it was a big firm, but I didn't realize it was that big.

11 **MR. SNYDER:** I don't.

12 **MAGISTRATE JUDGE FOSCHIO:** Make a note of it,
13 Mr. Boland.

14 **MR. BOLAND:** Yes, Your Honor, I'll note that.

15 **MAGISTRATE JUDGE FOSCHIO:** Yeah.

16 **MR. SNYDER:** In his response, which is docket 265,
17 the plaintiff now appears to agree that the Grant items are
18 covered by the order and agrees that they have not been
19 produced.

20 The justification is convoluted, not really worth
21 getting into. I'm happy to, bottom line is, Mr. --

22 **MAGISTRATE JUDGE FOSCHIO:** What do you take to be
23 the reason why you have to make the motion?

24 **MR. SNYDER:** Well, because he hasn't produced them
25 or -- or -- or promised to produce them or --

1 **MAGISTRATE JUDGE FOSCHIO:** He still wants you to do
2 it for yourself.

3 **MR. SNYDER:** We've asked him -- even though that's
4 not our job, we actually did ask him for information, that is,
5 to give us the hash, H-A-S-H, values of the 41 floppy disks in
6 Grant's possession so that Stroz Friedberg could endeavor --

7 **MAGISTRATE JUDGE FOSCHIO:** Is that the only basis
8 on which they could -- did you acknowledge that they're in
9 Stroz Friedberg's possession?

10 **MR. SNYDER:** We have no idea.

11 **MAGISTRATE JUDGE FOSCHIO:** Oh, you really have no
12 idea?

13 **MR. SNYDER:** We have no idea. If we knew, we
14 wouldn't --

15 **MAGISTRATE JUDGE FOSCHIO:** And the only tool that
16 you need to figure that out with one of your many hundreds of
17 lawyers or experts is -- are the hash values for the --

18 **MR. SNYDER:** Yeah, that was the information that
19 our experts told us was necessary --

20 **MAGISTRATE JUDGE FOSCHIO:** And you provided that
21 information to Mr. Boland?

22 **MR. SNYDER:** Yes. And he refused, telling us that
23 he would not do our job or Stroz Friedberg's job and -- and he
24 also --

25 **MAGISTRATE JUDGE FOSCHIO:** And in no way indicating

1 that that was burdensome for him to provide to you the hash
2 values?

3 **MR. SNYDER:** No. And simply sticking it to us and
4 refusing to comply.

5 **MAGISTRATE JUDGE FOSCHIO:** And why, in your
6 opinion, is it not burdensome for him to provide such
7 technical information?

8 **MR. SNYDER:** Presumably, if the 41 floppy disks are
9 in the possession of the expert, the expert, according to
10 Stroz Friedberg, can get those hash values readily. It's
11 not -- it's not an undue burden.

12 In any event --

13 **MAGISTRATE JUDGE FOSCHIO:** Say that again.

14 **MR. SNYDER:** It's not an undue burden for -- for
15 his expert, Mr. Grant --

16 **MAGISTRATE JUDGE FOSCHIO:** Mr. Grant.

17 **MR. SNYDER:** -- to provide us with those hash
18 values --

19 **MAGISTRATE JUDGE FOSCHIO:** Because?

20 **MR. SNYDER:** Apparently it's not difficult to
21 obtain hash values from -- from the -- from the floppies.

22 But all of this would be obviated, unnecessary, if
23 he just complied in the first place.

24 And the second excuse he gives is that these are
25 just copies, which, of course, is the height of hypocrisy for

1 this plaintiff and this new lawyer to attempt to excuse his
2 failure to produce copies of the electronic evidence called
3 for the by the Court's orders, while at the same time seeking
4 a TRO on Thanksgiving eve and sanctions against defense
5 counsel for requesting the destruction of copies pursuant to a
6 Court order in another case.

7 His final excuse is that he personally, I guess
8 Mr. Boland, personally never dealt with Mr. Grant or the
9 plaintiff never dealt with Mr. Grant and thus reasonably
10 forgot about the disks.

11 This creates additional credibility problems for
12 the plaintiff because initially the plaintiff asserted under
13 oath, for whatever that is worth in these proceedings, that he
14 gave the disks to Grant, that's document -- docket number 225
15 at paragraph 12.

16 Now, in reply the absent Mr. Argentieri, who
17 conveniently is not here to answer a number of important
18 troubling questions, says that he gave the disks to Mr. Grant
19 and that plaintiff wasn't involved.

20 So now we have a lawyer and client in disagreement
21 under oath --

22 **MAGISTRATE JUDGE FOSCHIO:** Well, be that as it may,
23 the plaintiff is in charge of all of his agents and is imbued
24 with the knowledge that they have based on acting within the
25 scope of their agency, i.e., legal representation.

1 **MR. SNYDER:** Yes, Your Honor. And this is, of
2 course, our fourth motion to compel.

3 **MAGISTRATE JUDGE FOSCHIO:** Yeah, just hold for one
4 second. The Court's relying again occasionally on technical
5 questions with Mr. Pat Healy, who is the -- the information
6 manager for the court. He is, I can assure you, very
7 knowledgeable.

8 You're sure that your -- Stroz Friedberg people
9 have used the technical terms "hash marks" to --

10 **MR. SNYDER:** Let me just to --

11 **MAGISTRATE JUDGE FOSCHIO:** -- the identifiers?

12 **MR. SNYDER:** Hash values, but I --

13 **MAGISTRATE JUDGE FOSCHIO:** Hash values.

14 **MR. SNYDER:** Yes, but I can -- Mr. Southwell just
15 elaborated. What Stroz Friedberg needs, we need the --
16 obviously, the floppy disks, but as a substitute to determine
17 whether we actually have them among the thousand floppies that
18 were produced -- is that the right number?

19 Any identifying information about the 41 Grant
20 floppy disks, could be the labels, could be serial numbers,
21 anything that would enable us to match the 41 to the thousand
22 or so that we have, not that that's our job, but we would be
23 happy to do that, but Mr. Boland --

24 **MAGISTRATE JUDGE FOSCHIO:** Well, that's exactly
25 what Mr. Healy just whispered to me. That's why -- if we're

1 going to go down this path, I don't want to have to have
2 further discussion about it.

3 **MR. SNYDER:** Sure. But that's what Mr. Boland has
4 steadfastly refused to provide to us --

5 **MAGISTRATE JUDGE FOSCHIO:** Perforce, these floppies
6 are actually -- they are physically in the custody of -- of
7 Stroz Friedberg at this time, but they don't know it, is that
8 the bottom line here?

9 Or is it that their contents has been transferred
10 to some hard drive of some sort in -- in -- in digital form
11 and that -- and they can't find it on the drive?

12 I'm really a little unclear about floppies vs. --

13 **MR. SNYDER:** Can I ask Mr. Southwell just to
14 address this one point?

15 **MAGISTRATE JUDGE FOSCHIO:** Please.

16 **MR. SOUTHWELL:** Your Honor, Stroz Friedberg has
17 forensic copies of many of the media that were produced
18 pursuant to the Court's orders.

19 So they actually have copies of the disks that were
20 produced by plaintiff.

21 **MAGISTRATE JUDGE FOSCHIO:** It's not on a floppy
22 disk?

23 **MR. SOUTHWELL:** We don't know what Mr. Grant has --

24 **MAGISTRATE JUDGE FOSCHIO:** No, no. I'm talking
25 about what's in Stroz Friedberg's possession.

1 **MR. SOUTHWELL:** Yes, they have it in the form of
2 floppy disks.

3 **MAGISTRATE JUDGE FOSCHIO:** They're floppy disks?
4 There are numerous disks that they use to make copies of other
5 material that was provided by the plaintiff?

6 **MR. SOUTHWELL:** They have it in digital
7 form. I believe it's on floppy disks. Some of it also may be
8 in hard copy. But they have kept very clear records of the
9 items that they acquired so they know, for example, that they
10 have a copy of floppy disk --

11 **MAGISTRATE JUDGE FOSCHIO:** I guess I'm not clear,
12 I'm not making myself clear.

13 Do we think or have reason to believe that the 41
14 floppy disks that are -- that were in Mr. Grant's possession,
15 that were provided by the plaintiff for his analysis and
16 possession were copied as another duplicate set of the same --
17 of the 41 underlying floppy disks and were then physically
18 transferred to Stroz Friedberg? Is that what I should
19 understand?

20 Or were they downloaded to a drive and, thus,
21 having anything other than hash marks or something else to go
22 into the drive and find the location of the data is what's
23 required ?

24 Because when you say "serial numbers," it strikes
25 me that you're talking about a floppy with a serial number on

1 it, which implies that they've got the floppy and, therefore,
2 just have to go through all of them that they have and find
3 the -- the serial numbers that are related to Mr. Grant.

4 **MR. SNYDER:** Your Honor, we just don't know, that's
5 the problem. We don't know whether the 41 floppy disks in Mr.
6 Grant's possession today were produced to us by the plaintiff
7 in any form at any time because we didn't know about Mr.
8 Grant, we weren't told about Mr. Grant until November 17th.

9 If the plaintiff would either produce those 41
10 floppy disks or give us sufficient identifying information
11 about them so we can determine whether, in fact, we have them
12 or not, then we would be in a position to know whether he's in
13 compliance.

14 **MAGISTRATE JUDGE FOSCHIO:** And the three forms of
15 identification are hash values, serial numbers and labels?

16 Is there anything else?

17 **MR. SNYDER:** Or any other identifying information
18 that would distinguish the physical items or identify them in
19 any way.

20 **MAGISTRATE JUDGE FOSCHIO:** All right.

21 **MR. SNYDER:** We just don't know.

22 **MAGISTRATE JUDGE FOSCHIO:** All right, thank you.
23 All right, let's turn to Mr. Boland.

24 Why did it take a motion to resolve this simple
25 dispute, Mr. Boland?

1 **MR. BOLAND:** Well, because --

2 **MAGISTRATE JUDGE FOSCHIO:** I mean, is there
3 anything about the Court's order that's ambiguous in some
4 way --

5 **MR. BOLAND:** Not at all.

6 **MAGISTRATE JUDGE FOSCHIO:** -- that -- thank you.

7 **MR. BOLAND:** On this point it's not.

8 **MAGISTRATE JUDGE FOSCHIO:** Why -- why -- why
9 couldn't you fix this problem without us allocating time this
10 afternoon to do so?

11 **MR. BOLAND:** Well, Your Honor, as you can imagine
12 on both sides of this case we all have tasks that we're
13 responsible to perform. And adding any tasks on to one side
14 or the other that's not our responsibility is probably not
15 warranted.

16 Let me start with this benchmark. The August 18th
17 order at page 4 says, "plaintiff shall not be required to
18 produce again any computers or electronic media produced to
19 date." So I'm starting with that benchmark.

20 And if we look back, Mr. Snyder said on June --

21 **MAGISTRATE JUDGE FOSCHIO:** Except that he was
22 obliged to identify certain things.

23 **MR. BOLAND:** Yes.

24 **MAGISTRATE JUDGE FOSCHIO:** Producing is one thing.
25 Identification is -- is the key problem here, isn't it?

1 Mr. Snyder, isn't that the threshold problem?

2 MR. SNYDER: Yes, of course.

3 MAGISTRATE JUDGE FOSCHIO: They weren't identified?

4 MR. BOLAND: And it's resolved by -- Mr. Snyder
5 acknowledged that this was resolved prior to this date.

6 MAGISTRATE JUDGE FOSCHIO: What was resolved?

7 MR. BOLAND: The issue of the identification and
8 knowing what they had. If I can refer you to the record to
9 establish it --

10 MAGISTRATE JUDGE FOSCHIO: Well, they certainly
11 weren't identified by Mr. Ceglia as required. They were --
12 they were identified as a result of other discovery requests
13 that eventually were satisfied.

14 MR. BOLAND: Actually, Your Honor, they were
15 produced and identified and Mr. Snyder acknowledged receiving
16 these specific disks --

17 MAGISTRATE JUDGE FOSCHIO: Really?

18 MR. BOLAND: -- I have the references to the record
19 I can give you right know.

20 MAGISTRATE JUDGE FOSCHIO: Is that in the papers?
21 Did I miss that?

22 MR. BOLAND: It's in the transcript. Mr. Snyder
23 says on August --

24 MAGISTRATE JUDGE FOSCHIO: No, no. Is it in your
25 papers? Did I miss it?

1 **MR. BOLAND:** It's not in the papers because after
2 those were filed I continued my investigation into the
3 transcripts, not the pleadings, and it's there that it's
4 revealed that Mr. Snyder admits, for example, on August --

5 **MAGISTRATE JUDGE FOSCHIO:** Excuse me, transcript of
6 an argument before the Court?

7 **MR. BOLAND:** Correct.

8 **MAGISTRATE JUDGE FOSCHIO:** And the docket
9 reference -- the date is what?

10 **MR. BOLAND:** August 17th, 2011, at page 62.

11 **MAGISTRATE JUDGE FOSCHIO:** Okay.

12 **MR. BOLAND:** And it's a brief sentence. Mr. Snyder
13 says, "yes" in an answer -- to a question of yours, "and that
14 goes to the issue that all he's produced, meaning Ceglia, to
15 us are floppy disks that contain Word document files."

16 And in a prior reference in that case --

17 **MAGISTRATE JUDGE FOSCHIO:** Well, just a second. I
18 mean, but those floppies were in Mr. -- Mr. Grant's
19 possession.

20 **MR. BOLAND:** No, Your Honor. Mr. Grant in his
21 declaration states he received the 41 floppies. He made a
22 forensic copy of them.

23 And then in the papers we filed you see that the
24 path of those disks are they go back to Mr. Argentieri, which
25 our papers reveal.

1 Mr. Scherer, from the Lippes law firm, takes the
2 physical floppy disk from Mr. Argentieri --

3 **MAGISTRATE JUDGE FOSCHIO:** Mm-hmm.

4 **MR. BOLAND:** -- he gives them to PLA, and Stroz
5 Friedberg had total access to those floppy disks and they have
6 the forensic copies of them.

7 And Mr. Snyder even says again on August 17th --

8 **MAGISTRATE JUDGE FOSCHIO:** But where in that
9 process would it come to pass that the plaintiff would have
10 identified the 41 floppies as having been in Mr. Grant's
11 possession before they had been transmitted to the defendants.

12 **MR. BOLAND:** The plaintiff -- Mr. Ceglia, first of
13 all, was not notified, nor was I notified until we dug through
14 this that Mr. Grant had made a copy and kept a copy. No one
15 called Mr. Ceglia on the phone and says "you might need to
16 know this for the future."

17 **MAGISTRATE JUDGE FOSCHIO:** How did Grant get in the
18 picture so that he might eventually end up with these
19 floppies?

20 How did he come to be a consultant to the
21 plaintiff?

22 **MR. BOLAND:** In our papers -- I'm not sure if
23 Mr. Argentieri or my client contacted Mr. Grant, but he's
24 known in this area as a computer forensics expert and --

25 **MAGISTRATE JUDGE FOSCHIO:** It's not what he's known

1 in the area as.

2 The question is was he known to the plaintiff at a
3 point in time when the plaintiff was obliged to disclose the
4 locations and the nature of the floppies and other stored
5 material that were required to be disclosed to the defendants?

6 **MR. BOLAND:** It's a two part question. He was
7 known to the plaintiff certainly.

8 The question is was the plaintiff aware, did anyone
9 call Mr. Ceglia and say Mr. Grant has made -- has retained
10 copies of these floppy disks?

11 Mr. Ceglia was not aware of that at the time he
12 made his declaration.

13 **MAGISTRATE JUDGE FOSCHIO:** Because of a failure by
14 perhaps Mr. Argentieri or one of the other lawyers who were
15 assisting him at that time?

16 **MR. BOLAND:** It may have been a failure to ask
17 Mr. Grant, hey, did you keep copies of these? Do you have
18 duplicates? What are you doing with them? Or did you just
19 evaluate them and -- and move on? No one asked that question
20 of Mr. Grant.

21 So Mr. Ceglia's not giving a false declaration. He
22 didn't have knowledge that those copies were retained.

23 But what's more to the point, this motion's not
24 necessary because in that August 17th hearing, Mr. Snyder says
25 "what he gave us, Your Honor, are floppy disks that contain

1 cut and paste jobs that he wants everyone to believe were once
2 actual e-mails."

3 So they are not confused which disks have the
4 e-mails because Mr. Snyder is admitting receiving disks that
5 have cut and paste jobs of e-mails. Someone at Stroz
6 Friedberg must have told him we've got the disks and they have
7 these cut and paste e-mails.

8 Again, it goes to why am I doing their job? Stroz
9 Friedberg obviously identified which disks had it. They told
10 Mr. Snyder. On August 17th the transcript at page 42, he told
11 you.

12 There's no mystery here. The fact that Stroz
13 Friedberg now today can't figure out which one of those
14 floppies they previously told Mr. Snyder about, I don't see as
15 the plaintiff's job to help them figure that out.

16 In addition --

17 **MAGISTRATE JUDGE FOSCHIO:** Well, it's just -- I'm
18 not trying to be difficult at all --

19 **MR. BOLAND:** Sure.

20 **MAGISTRATE JUDGE FOSCHIO:** -- it just strikes me as
21 still begging the question of who had the burden of
22 investigating the sources and the obligation to fully disclose
23 them and detail them in the required disclosure that was also
24 ordered by the Court at that point in time.

25 It seems to me that if Mr. Grant was in the -- part

1 of the plaintiff's team, somebody on the plaintiff's team
2 should have known that and somebody should have questioned him
3 as to whether he has any material that's subject to the
4 Court's order.

5 **MR. BOLAND:** I grant you, Your Honor, at that time
6 that that order was issued, Mr. Grant was known by, at least
7 Mr. Argentieri, to have been provided those disks.

8 Whether Mr. Argentieri or Mr. Ceglia knew that he
9 retained a copy of them, I can't speak on that. But had they
10 known that, they had a burden, of course, to come forward and
11 say, hey, Judge, this individual has a copy.

12 But I -- there's no evidence that Mr. Ceglia knew
13 that and was trying to conceal that. It's helpful evidence.

14 **MAGISTRATE JUDGE FOSCHIO:** I'm not focusing -- I'm
15 not interested in concealment or --

16 **MR. BOLAND:** Well, that was the word Mr. Snyder
17 used.

18 **MAGISTRATE JUDGE FOSCHIO:** -- well, that's
19 Mr. Snyder's word. It's not mine.

20 He had --

21 **MR. BOLAND:** Precisely.

22 **MAGISTRATE JUDGE FOSCHIO:** -- an obligation to
23 disclose. He had an obligation to investigate, and he and/or
24 his lawyers failed to do it. That's all I'm trying to point
25 out to you.

1 And that seems to me to be the real cutting edge of
2 the reason for this whole rigamarole over 41 additional floppy
3 disks.

4 **MR. BOLAND:** The way I read it, Your Honor, the
5 thrust of their motion is we can't figure out which, if we
6 have those 41 floppy disks. Can you help us figure that out?

7 And that's false. They actually know which ones
8 they are because they said on August 17th --

9 **MAGISTRATE JUDGE FOSCHIO:** Well, I don't think it
10 follows that because we don't have -- do we know that --
11 when Mr. -- what is the basis of your belief that when
12 Mr. Snyder is using his now very well-known cut-and-paste
13 aphorism here to make his points, that he is referring to
14 these 41 disks?

15 **MR. BOLAND:** Because he refers to them not as cut
16 and paste. He says "floppy disks that contain cut and paste
17 jobs that he, Ceglia, wants everyone to believe were once
18 actual e-mails."

19 There are no other floppy disks in this case
20 purported to contain e-mails. Those are the ones and he's
21 been calling them "cut and paste" from the beginning
22 repeatedly.

23 And on August 17th he says "we got them. They
24 produced them to us and they're junk," Your Honor. And now
25 they're saying we don't know if we got them. Well, you do

1 know.

2 The motion was completely useless.

3 **MAGISTRATE JUDGE FOSCHIO:** And that is why there
4 was no identification of Mr. Grant having had possession of
5 the 41 floppies and -- and that is why there was a decision
6 consciously by Mr. Lake who prepared the declaration to
7 exclude that information?

8 **MR. BOLAND:** No, Your Honor.

9 **MAGISTRATE JUDGE FOSCHIO:** No.

10 **MR. BOLAND:** There was no intentional failure to
11 disclose Mr. Grant. He wasn't known to Mr. Ceglia at that
12 time to have kept a copy. That's the point.

13 He was known to Mr. Ceglia. He wasn't known to
14 keep a copy.

15 **MAGISTRATE JUDGE FOSCHIO:** He was known to
16 Mr. Argentieri, and Mr. Argentieri --

17 **MR. BOLAND:** Of course.

18 **MAGISTRATE JUDGE FOSCHIO:** -- could have called
19 him, realizing that the Court's order was very specific and
20 unambiguous so...

21 **MR. BOLAND:** And that -- that's not the thrust of
22 their motion. It's we don't know where the disks are, can you
23 help us? And they know where the disks are. That's our
24 position.

25 **MAGISTRATE JUDGE FOSCHIO:** Well, why would they

1 waste time and money preparing a motion that was, you know,
2 basically moot?

3 **MR. BOLAND:** Because they don't read the
4 transcripts. They're not detail oriented. If they would have
5 read the transcript, they would have seen Mr. Snyder admitted
6 receiving them.

7 **MAGISTRATE JUDGE FOSCHIO:** If you were them, first
8 thing you would do is make sure your experts really couldn't
9 figure it out before you spent the client's time and money
10 on --

11 **MR. BOLAND:** That brings up one other point, Your
12 Honor. The hash value issue is not the only way to find these
13 disks.

14 These are all able to be mounted on a single drive.
15 They could send out a search request. They know the details
16 of the e-mails because we've given them to them previously.
17 All Stroz Friedberg has to do is sit at a computer, throw in
18 the necessary search terms, they would locate across all the
19 data.

20 **MAGISTRATE JUDGE FOSCHIO:** What necessary search
21 terms are those?

22 **MR. BOLAND:** They can search every word of the
23 e-mails we've provided them and find the precise media that
24 that stuff came from. It's like searching on Google, same
25 thing.

1 **MAGISTRATE JUDGE FOSCHIO:** That presupposes that
2 they know the words that are in these 41 e-mails.

3 **MR. BOLAND:** They do because we've given them to
4 them in previous pleadings and papers. They have them. We've
5 actually -- we attached them as an exhibit, the entirety of
6 these e-mails were in an exhibit to a prior motion.

7 So they can go through and search all those words
8 and find them, sure. Were provided in prior papers and Stroz
9 Friedberg knows how to do search term, you know, inquiries to
10 this media and they could have found it in a very short period
11 of time, no motion needed.

12 They chose not to.

13 **MAGISTRATE JUDGE FOSCHIO:** You didn't mention this
14 concept to Mr. Southwell or Mr. Snyder?

15 **MR. BOLAND:** Yes.

16 **MAGISTRATE JUDGE FOSCHIO:** You just told -- you
17 did? I thought it was just get some of your lawyers to think
18 about it.

19 **MR. BOLAND:** I said to them Stroz Friedberg has
20 everything. They can search and find it. It's very easy.

21 **MAGISTRATE JUDGE FOSCHIO:** That's what you meant?
22 That's what you meant?

23 **MR. BOLAND:** Yes.

24 **MAGISTRATE JUDGE FOSCHIO:** Oh, okay. And it was --

25 **MR. BOLAND:** Again --

1 **MAGISTRATE JUDGE FOSCHIO:** -- it was their fault
2 for not realizing that technically Stroz Friedberg should have
3 or were fully capable of doing it?

4 **MR. BOLAND:** Yes.

5 **MAGISTRATE JUDGE FOSCHIO:** I see.

6 **MR. BOLAND:** And Mr. Snyder admits that they've
7 done it in the past. Stroz Friedberg already identified it
8 for them.

9 **MAGISTRATE JUDGE FOSCHIO:** I understand. Thank
10 you. Well, there you go.

11 **MR. SNYDER:** Just briefly, Your Honor --

12 **MAGISTRATE JUDGE FOSCHIO:** So you're not going to
13 bill your client for this motion?

14 **MR. SNYDER:** Your Honor, you know, we are as
15 frustrated as maybe the Court is --

16 **MAGISTRATE JUDGE FOSCHIO:** No, I'm just trying to
17 be fair here and figure out what went wrong here and why I'm
18 being favored with --

19 **MR. SNYDER:** What went wrong is --

20 **MAGISTRATE JUDGE FOSCHIO:** -- all these extra
21 motions. I know you like them, you wanted to come in and see
22 the new courthouse for sure, and you always like seeing me,
23 but this is one issue that could -- I could have just as well
24 passed on.

25 **MR. SNYDER:** We had hoped, Your Honor, just to put

1 this in context, with all deadly seriousness, we had hoped to
2 move to dismiss this case in September when the plaintiff was
3 obligated by the end of August to be in compliance.

4 We're here six months later because this plaintiff
5 has obstructed the expedited discovery process.

6 **MAGISTRATE JUDGE FOSCHIO:** No, just focus in --

7 **MR. SNYDER:** So -- so --

8 **MAGISTRATE JUDGE FOSCHIO:** -- on this one little
9 simple concept --

10 **MR. SNYDER:** So -- so --

11 **MAGISTRATE JUDGE FOSCHIO:** -- which is --

12 **MR. SNYDER:** Okay.

13 **MAGISTRATE JUDGE FOSCHIO:** -- could Stroz Friedberg
14 have picked up on what he's --

15 **MR. SNYDER:** Absolutely --

16 **MAGISTRATE JUDGE FOSCHIO:** -- said to you, go
17 search for it and without making the motion?

18 **MR. SNYDER:** Absolutely not, for a very simple
19 reason.

20 **MAGISTRATE JUDGE FOSCHIO:** Which is?

21 **MR. SNYDER:** Mr. Grant did not even say in his
22 submissions to the Court that the disks contained copies of
23 supposed e-mails.

24 He doesn't say what the disks contain at all. So
25 we were in the dark. We knew that Mr. Ceglia did not disclose

1 the existence of Grant.

2 We had no idea what the 41 floppy disks contained
3 or didn't contain. And Mr. Boland gave us a stiff arm
4 asking --

5 **MAGISTRATE JUDGE FOSCHIO:** Okay, okay, all right.

6 **MR. SNYDER:** -- when we asked him for any help or
7 assistance. So what we simply need is sufficient identifying
8 information about the 41 floppy disks so we can conduct an
9 investigation to determine whether we have them or not.

10 We have no idea what is on those disks.

11 **MAGISTRATE JUDGE FOSCHIO:** I understand. But I
12 hesitate to even ask --

13 **MR. SNYDER:** Yes.

14 **MAGISTRATE JUDGE FOSCHIO:** -- if it wasn't e-mails,
15 what did you think it might be?

16 **MR. SNYDER:** We had no idea, Your Honor. We had no
17 idea. We knew that it was -- it was of concern to us that he
18 concealed his existence in repeated sworn statements to the
19 Court about what electronic assets existed.

20 We only learned of it kind of inadvertently when he
21 mentioned Grant in some other motion, not -- not -- not a
22 disclosure of -- of -- of an expert with electronic assets.

23 And so we simply need all of the evidence to
24 complete the record and we don't know what's on those 41
25 floppy disks at all.

1 **MAGISTRATE JUDGE FOSCHIO:** All right, all right,
2 all right.

3 **MR. SNYDER:** So what we would request, Your Honor,
4 is simply an order --

5 **MAGISTRATE JUDGE FOSCHIO:** I understand.

6 **MR. SNYDER:** -- directing identification,
7 production and certification of all electronic assets and
8 documents in Mr. Grant's possession responsive to the orders.

9 And if we already have them, we can then trace them
10 to the assets we have and the matter will be closed.

11 **MAGISTRATE JUDGE FOSCHIO:** Thank you. Quick
12 rebuttal? Sur-rebuttal?

13 **MR. BOLAND:** Your Honor, I can actually help them
14 trace it. The August 1st privilege log that Stroz Friedberg
15 produced, if your assistant can just flip my screen up on
16 everyone's screen, items 26 through 32 have already been
17 identified --

18 **MAGISTRATE JUDGE FOSCHIO:** Sure.

19 **MR. BOLAND:** -- as floppy disks with the e-mails in
20 Word document format. They're already on there.

21 **MR. SNYDER:** That's not sufficient, Your Honor.

22 **MAGISTRATE JUDGE FOSCHIO:** Just a second. I want
23 to try out all this technology.

24 **MR. BOLAND:** Do you see 26? I'll try to zoom it up
25 if you can't. 26 through 32, this is the Stroz Friedberg

1 privilege log. Each line starts with D-O-C, which defines a
2 Word -- Microsoft Word document.

3 And then the continuation says file containing what
4 appears -- I'm sorry, it starts at 27 actually. File
5 containing what appears to be correspondence between
6 Zuckerberg and Ceglia and there's a bunch of dates.

7 And then if you see to the end here, Your Honor,
8 the designation in that last column F-L-O-3. I'm guessing
9 that's floppy disk by Stroz Friedberg.

10 So there you see a bunch of floppies containing a
11 bunch of e-mails, which are the e-mails we've produced already
12 in papers coming from Word documents in the possession of the
13 expert.

14 **MR. SNYDER:** Your Honor --

15 **MR. BOLAND:** So --

16 **MAGISTRATE JUDGE FOSCHIO:** Why would we believe
17 that 41 floppies are necessarily a fortiori, if you will,
18 within the scope of that particular entry?

19 **MR. BOLAND:** Well, Your Honor, because we provided
20 in our papers absolute proof that all the floppies from
21 Mr. Grant, the original floppies, made it to PLA, which was
22 the provider.

23 And then only two of them, as Mr. Grant said in his
24 declaration, even had what he thought was relevant e-mails.
25 And so all of them were provided to Stroz Friedberg.

1 How they rearranged them, I have no way of knowing.

2 **MAGISTRATE JUDGE FOSCHIO:** They should have known
3 that.

4 **MR. BOLAND:** Who should have known what?

5 **MAGISTRATE JUDGE FOSCHIO:** The defendants. They
6 should have known that.

7 **MR. BOLAND:** They actually acknowledged that they
8 got this. It's not that they should have known it, they
9 acknowledged receiving it.

10 **MR. SNYDER:** Just to correct the false record
11 just presented, first of all, that's five items on a privilege
12 log.

13 Second, I believe the reference to F-L is a
14 reference to Florida, not floppy disks.

15 And this is a hide the ball kind of approach. What
16 is clear and becoming more apparent in these proceedings is
17 that this plaintiff and this lawyer for some reason don't want
18 to comply with the order as it relates to Mr. Grant.

19 We simply want compliance with the order, which
20 is --

21 **MAGISTRATE JUDGE FOSCHIO:** I think they want to
22 comply. They just don't want to have attorney's fees awarded
23 against them. That's really what we're talking about at this
24 point in the conversation here, aren't we?

25 Aren't we, Mr. Boland?

1 **MR. BOLAND:** Your Honor, Mr. Ceglia --

2 **MAGISTRATE JUDGE FOSCHIO:** I mean, you really have
3 no objection to granting the order?

4 **MR. BOLAND:** Mr. Ceglia is going to comply with
5 every order that he's required to comply with. And if this
6 has been overlooked by a mass of documents and no one informed
7 him, he will simply submit another declaration saying now I
8 know Jerry Grant has copies. That's fine.

9 **MAGISTRATE JUDGE FOSCHIO:** Well, I'm sure that the
10 defendant would see it otherwise. I -- you've convinced me
11 that it's an honest error. That there was no intent to
12 mislead and, arguably, your failure to provide it more timely
13 was substantially justified. And you got to learn to take yes
14 for an answer on some of these issues --

15 **MR. BOLAND:** Yes, Your Honor, they can have copies,
16 again, of the 41 --

17 **MAGISTRATE JUDGE FOSCHIO:** Fine.

18 **MR. BOLAND:** -- of the images of the 41.

19 **MAGISTRATE JUDGE FOSCHIO:** All right. Motion
20 granted, no fees.

21 Mr. Southwell, you will prepare your usual skillful
22 order along with -- along with Ms. Aycock's able assistance,
23 no doubt.

24 And Mr. Flynn's got to get his fingerprints on it
25 and he can do so as well.

1 **MR. FLYNN:** Thank you, Your Honor.

2 **MAGISTRATE JUDGE FOSCHIO:** All right. Next?

3 **MR. SNYDER:** Yes, Your Honor, the motion to strike
4 the Gianadda declaration and for sanctions. The declaration
5 filed by Mr. Boland and fining Mr. Boland for his deceit --

6 **MAGISTRATE JUDGE FOSCHIO:** Let me try to move along
7 here. Why isn't it fair to say that based on Mr. Gianadda's
8 declarations, competing declarations, if you will, that he
9 changed his mind as to what he recalled and that's it?

10 I mean, why do we need to strike anything?

11 **MR. SNYDER:** It's not -- because with all due
12 respect, Your Honor, that's not what happened.

13 **MAGISTRATE JUDGE FOSCHIO:** I know you're being
14 respectful. So you don't have to start that way.

15 **MR. SNYDER:** It's not what the record shows. The
16 record shows that Mr. Boland deceived --

17 **MAGISTRATE JUDGE FOSCHIO:** I want to tee this up so
18 we can try to get through it. As far as misconduct by
19 Mr. Boland is concerned, there are two disciplinary
20 authorities that you can bring the matter to.

21 One is the -- cause he by virtue of being admitted
22 in this court is subject, I think, under our local rules to
23 the New York State Code of Professional Responsibility, which
24 in turn is enforced by the Appellate Division, Fourth
25 Department, which has a disciplinary arm.

1 Mr. Flynn is well familiar with it.

2 So if you think Mr. Boland's in violation of any of
3 the relevant disciplinary rules, as a lawyer you have an
4 obligation to bring it to their attention.

5 Similarly, he is also subject to disciplinary rules
6 in the, I suspect, some state court that has jurisdiction in
7 Cleveland.

8 I'm not particularly interested in -- in -- in, at
9 least in this matter, filing complaints on behalf of the Court
10 to any other judicial body with regard to enforcing the Code
11 of Professional Responsibility. I'll leave it to you if you
12 feel that strongly about it.

13 I'm intrigued by the idea that because of whatever
14 Mr. Boland said or didn't say, more to the point, Mr.
15 Gianadda, apparently a competent, intelligent, mature person,
16 signed one document under oath; and then signed another
17 document under oath, which was at some variance with the first
18 document.

19 Why does that require me to take action with regard
20 to striking anything on my records?

21 **MR. SNYDER:** If you give me a moment I'll explain.

22 **MAGISTRATE JUDGE FOSCHIO:** I'm going to give you a
23 moment, but I just want to help you by telling you what is on
24 my -- what my approach to this is.

25 **MR. SNYDER:** Thank you. I'll state at the outset

1 that, and then I'll go -- I'll go to first principles, there
2 was no change of mind or variance with the first document.

3 But I will get to that in a moment.

4 The reason this Court has inherent power, as all
5 district courts do to sanction --

6 **MAGISTRATE JUDGE FOSCHIO:** I know all about that.

7 **MR. SNYDER:** Right. So -- so striking a
8 declaration procured by --

9 **MAGISTRATE JUDGE FOSCHIO:** Sanctioning -- excuse
10 me, excuse me, sanctioning is one thing. Striking a document
11 that's been duly filed with the Court is something else.

12 **MR. SNYDER:** Well, let me start with --

13 **MAGISTRATE JUDGE FOSCHIO:** Two totally different
14 concepts in my mind.

15 **MR. SNYDER:** We seek two distinct -- we seek two
16 distinct types of relief. One, striking the declaration.
17 And, two, sanctions.

18 So let me address the striking of the declaration
19 first. This Court, as Your Honor acknowledges, has inherent
20 power to sanction errant litigants and in particular courts
21 have imposed a sanction of excluding or striking evidence,
22 declarations in particular, when that evidence was improperly
23 obtained through deceit, fraud or misleading conduct by an
24 attorney.

25 Here, that's exactly what happened. What happened

1 was Mr. Boland's scheme actually proceeded in four stages: A
2 deceptive phone call, a misleading draft, corruptly and
3 deceitfully procuring the signature on that draft, misleading
4 the Court about what that draft said, and then making false
5 accusations based on no evidence against the witness and
6 declarant, attacking his integrity and impartiality with no
7 basis whatsoever.

8 So the first part was to manufacture evidence to
9 support his baseless notion that the document, the original
10 work-for-hire document, was altered by the defendants.

11 Mr. Boland called Mr. Gianadda in the evening when
12 he was with family --

13 **MAGISTRATE JUDGE FOSCHIO:** I am clear with the
14 scenario.

15 **MR. SNYDER:** Right. He groomed him. He never told
16 him that he was going to be filing it in court, which was a --
17 a -- a glaring and disturbing omission.

18 Mislead him, lied to him and said it was only going
19 to be used as the first step in a dialogue, implying that
20 Mr. Boland then would call Mr. Southwell or correspond with
21 Mr. Southwell --

22 **MAGISTRATE JUDGE FOSCHIO:** I'm trying to help you
23 here, counsel.

24 **MR. SNYDER:** Yes.

25 **MAGISTRATE JUDGE FOSCHIO:** What we have now, what

1 you believe with Mr. Southwell's able assistance to Mr.
2 Gianadda, what Mr. Gianadda now tells us is the more accurate
3 version of what he wanted to say and would have said had he
4 been given a better opportunity and better counseling about it
5 in the first instance.

6 **MR. SNYDER:** But, no, Your Honor, because Mr. --

7 **MAGISTRATE JUDGE FOSCHIO:** So what's the harm in
8 having two Gianadda declarations on record here?

9 **MR. SNYDER:** The harm is that the first one was
10 procured by deceit and by subterfuge.

11 **MAGISTRATE JUDGE FOSCHIO:** That has to do with my
12 point about whether or not that, in fact, happened, which I
13 would have to make a finding based on a written record.

14 And also it -- it involves a determination that
15 there was a violation of the Code of Professional
16 Responsibility.

17 **MR. SNYDER:** I don't think Your Honor needs to
18 reach the second conclusion so long as the Court finds, as I
19 think this record provides ample basis for finding, that the
20 declarant and witness here was duped into believing --

21 **MAGISTRATE JUDGE FOSCHIO:** You can bet that if I
22 were to make that finding and somebody were to contact the
23 disciplinary authorities, that my finding would be probably
24 Exhibit A in their file, wouldn't it?

25 **MR. SNYDER:** Well, well, I think there's no

1 question here, even Mr. Boland's sworn statements to the Court
2 confirm that this declarant was duped into believing that he
3 was participating in an innocuous --

4 **MAGISTRATE JUDGE FOSCHIO:** That's a strong word.

5 **MR. SNYDER:** Well, he was duped into believing that
6 he was -- that he was not -- that he was participating in a
7 more innocuous process than was Mr. Boland's intent because
8 intent --

9 **MAGISTRATE JUDGE FOSCHIO:** Did -- did Mr. Boland --
10 did Mr. Boland -- maybe I missed this. Did Mr. Boland ever
11 say that it would not be filed?

12 **MR. SNYDER:** He told him it was going to be used as
13 the first step in a discussion about --

14 **MAGISTRATE JUDGE FOSCHIO:** Did he ever say that it
15 was not going to be filed in court?

16 **MR. SNYDER:** I think that was the fair implication
17 of what he said --

18 **MAGISTRATE JUDGE FOSCHIO:** Really?

19 **MR. SNYDER:** -- when he told the witness that it
20 was going to be used --

21 **MAGISTRATE JUDGE FOSCHIO:** To get Mr. Southwell's
22 attention, something to that effect.

23 **MR. SNYDER:** Right. Omitting the critical fact
24 that he was going to file it the very next morning.

25 But worse than that, the declaration was used in

1 support of a false and misleading assertion to the Court in
2 accompanying papers, and he put it on his blog the next day
3 for the world to see, saying that the -- the -- the document
4 changed color somehow during the course of the testing.

5 When Mr. Gianadda told the Court in his second and
6 third declarations with complete clarity --

7 **MAGISTRATE JUDGE FOSCHIO:** But that was in --

8 **MR. SNYDER:** -- that that's not what he said.

9 **MAGISTRATE JUDGE FOSCHIO:** -- but that was in the
10 document that Mr. Gianadda signed.

11 **MR. SNYDER:** Mr. Gianadda never said that the
12 document changed color, ever, during the course of the
13 testing.

14 **MAGISTRATE JUDGE FOSCHIO:** Well, he may not have,
15 but that was what Mr. Boland says that he thought Mr. Gianadda
16 told him over the phone and he put it in the document, didn't
17 he?

18 **MR. SNYDER:** But Mr. Gianadda has sworn to this
19 Court now twice that he told Mr. Boland clearly that the
20 document did not change color --

21 **MAGISTRATE JUDGE FOSCHIO:** I know.

22 **MR. SNYDER:** -- so someone is lying.

23 **MAGISTRATE JUDGE FOSCHIO:** I know. But those words
24 were in the document that Mr. Gianadda read, presumably,
25 before he signed it and then signed it.

1 **MR. SNYDER:** No, all he said in his first
2 declaration was the documents appeared white as opposed to
3 blue, green, yellow, purple or orange.

4 Mr. Gianadda also told Mr. Boland clearly, as he
5 tells the Court, that the document did not change color at all
6 throughout the defendants' inspection and Mr. Boland omitted
7 that from the declaration.

8 **MAGISTRATE JUDGE FOSCHIO:** That's my point. If Mr.
9 Gianadda felt that that was a material deviation of what he
10 said, then why did he sign the document?

11 **MR. SNYDER:** He didn't understand that this was a
12 final sworn statement to be filed in court.

13 **MAGISTRATE JUDGE FOSCHIO:** He signed it under oath.

14 **MR. SNYDER:** But -- yes, Your Honor.

15 **MAGISTRATE JUDGE FOSCHIO:** He didn't know it was
16 going to be filed in court, but he also signed it under oath?

17 **MR. SNYDER:** He also didn't -- if he was told this
18 is going to be filed in court in support of an argument that
19 the document changed color during the course of the testing,
20 Mr. Gianadda would have said are you crazy? I just told you
21 it didn't change color.

22 **MAGISTRATE JUDGE FOSCHIO:** But -- but whatever he
23 wrote -- whatever was written on the first document, he could
24 see.

25 **MR. SNYDER:** And it was accurate.

1 **MAGISTRATE JUDGE FOSCHIO:** It was?

2 **MR. SNYDER:** But it was -- it was --

3 **MAGISTRATE JUDGE FOSCHIO:** It was incomplete?

4 **MR. SNYDER:** -- it was -- it was -- the use to
5 which it was put by Mr. Boland and his client was nefarious
6 and dishonest and, therefore, the entire declaration procured
7 by -- by deceit, used for an improper purpose should be
8 stricken because this Court certainly has the inherent power
9 to police that kind of -- that kind of game playing.

10 And to make matters worse, to make matters worse,
11 Mr. Boland admits that Mr. Gianadda -- you can picture the
12 scene at the dinner table or in the living room with his
13 kids -- repeated several times that he didn't want to sign it
14 until he spoke with Mr. Southwell.

15 **MAGISTRATE JUDGE FOSCHIO:** Then why didn't he do
16 that?

17 **MR. SNYDER:** Because he's a lay person, at home, at
18 night, being pressured by a very aggressive attorney who is
19 using deceptive and improper pressure tactics, including by
20 telling him wink wink, don't worry, this is an innocuous
21 document, it's going to be used as a discussion piece.

22 **MAGISTRATE JUDGE FOSCHIO:** Was it before or after
23 Mr. Southwell contacted Mr. Gianadda that Mr. Gianadda took
24 umbrage at the absence of the statement that he claims in his
25 second document, his second declaration, to have actually told

1 Mr. Boland about the scenario?

2 **MR. SNYDER:** When Mr. Gianadda heard two facts he
3 was outraged and felt not only taken advantage of, but
4 deceived.

5 When he heard that it was filed in court, he was --
6 he was very, very upset.

7 And when he heard that it was filed for the purpose
8 of suggesting that the document changed color during the
9 course of the testing, he was even more outraged because he
10 expressly told Mr. Boland that that was not the truth.

11 **MAGISTRATE JUDGE FOSCHIO:** Look, I don't want to --
12 I don't want to -- I'm not in any way saying anything or
13 intending to say anything that in any way condones sharp
14 practice by attorneys or outright violations of the -- of the
15 rules of professional responsibility.

16 All I am pointing out is that Mr. Gianadda, albeit
17 feeling a sense of pressure, did not feel a need to contact
18 Mr. Southwell about the matter until Mr. Southwell saw the
19 declaration and contacted him.

20 **MR. SNYDER:** For good purpose because Mr. Boland
21 duped him and deceived him by saying --

22 **MAGISTRATE JUDGE FOSCHIO:** Well, he didn't dupe him
23 about sending a copy to Mr. Southwell.

24 **MR. SNYDER:** No, he did, because he said if you
25 sign this document and --

1 **MAGISTRATE JUDGE FOSCHIO:** I thought --

2 **MR. SNYDER:** -- yes, if you sign this document and
3 e-mail it to me and Mr. Southwell, it will be, quote, a
4 convenient way to start a dialogue between two lawyers who
5 would then communicate and then he would no longer be in the
6 middle.

7 Mr. Gianadda --

8 **MAGISTRATE JUDGE FOSCHIO:** Exactly my point, and I
9 don't want to quibble with you about this.

10 **MR. SNYDER:** Mm-hmm.

11 **MAGISTRATE JUDGE FOSCHIO:** I want to move on.

12 **MR. SNYDER:** Yes.

13 **MAGISTRATE JUDGE FOSCHIO:** That was done and it
14 was not until after Mr. Southwell called him, presumably
15 expressing upset with the document, that it occurred to
16 Mr. Gianadda that the document was deficient.

17 **MR. SNYDER:** Not that it was deficient. That it
18 was -- that -- that it was being used for an improper purpose,
19 and that he was -- and that he was being -- that he had been
20 duped.

21 And then -- and what happened was the -- the deceit
22 here and the reason this Court should strike the declaration,
23 the deceit here is very, very simple. The deceit is
24 Mr. Boland mislead a non-lawyer in the evening, calling him at
25 home, into believing that he was e-mailing the signed

1 declaration as a preliminary step.

2 His ruse was to tell the witness that he needed a
3 declaration only as a way to speed things along, to facilitate
4 a dialogue between counsel.

5 And based on his representation that he didn't
6 speak to Mr. Southwell by phone, rather than telling him
7 truthfully, I'm going to take this and I'm going to put it on
8 my blog. And you know what I'm going to write on my blog?
9 This is document 229, Exhibit A, neutral third-party confirms
10 Facebook damaging of Ceglia's contract.

11 **MAGISTRATE JUDGE FOSCHIO:** I know, I read it.

12 **MR. SNYDER:** That's an outrage because it is false.
13 That's not what he said this to lawyer. He said the contrary.

14 **MAGISTRATE JUDGE FOSCHIO:** Those are Mr. Boland's
15 characterizations of it.

16 **MR. SNYDER:** But it's false. It's a false
17 characterization because the witness told him the document did
18 not change color. So that is a lie.

19 And what he told this Court -- what he told this
20 Court was that this Gianadda declaration proves that the
21 document changed color during the course of the examination
22 when the witness clearly told him, but he omitted it from the
23 declaration, that that was not the case.

24 And then once his scheme to manipulate this witness
25 blew up, he then resorted to mud slinging and character

1 assassination.

2 So what he did is he said that this -- this
3 videographer was -- was in our back pocket, he was pressured.

4 So Mr. Gianadda submitted another declaration
5 saying he felt no pressure from anyone and what we have here
6 is we have Mr. Flynn and Mr. Southwell interacting with this
7 witness, who the witness says did not pressure him on the one
8 side.

9 And you have Mr. Boland on the other side who is
10 submitting statements to this Court where he has no
11 explanation, no explanation for why he lied to the client.
12 Because the lie -- I mean to the witness.

13 The lie, the deceit was, this is a preliminary
14 step. The deceit, the untruthful statement that procured the
15 signature on the declaration was, this is a convenient way to
16 start a dialogue. That was a lie.

17 What he should have said was, "I'm going to file
18 this at 9:00 a.m." --

19 11:00 a.m.?

20 **MR. SOUTHWELL:** 11:30 a.m.

21 **MR. SNYDER:** -- "11:30 a.m. tomorrow morning, I'm
22 going to put it on the blog -- my blog and I'm going to tell
23 the world that you confirmed that Facebook has destroyed and
24 tampered with evidence."

25 It is difficult in my judgment to imagine -- well,

1 let me not overstate it. This is a paradigmatic case of a
2 declaration being procured by improper conduct giving this
3 Court raw discretion to exercise its inherent power.

4 If the Court doesn't want to sanction Mr. Boland,
5 certainly as a reasonable and proportionate response to the
6 bad faith and improper conduct here, the imposition of the
7 lesser sanction of striking the declaration is appropriate,
8 proportionate and reasonable.

9 And to not do so and to simply allow this to sit in
10 the record alongside the corrected -- the corrected
11 declarations would be to sanction, permit using the word in
12 that way, to sanction this -- this trickery.

13 If he had been silent or if he had simply said I
14 need a declaration would have been sharp practice. Certainly
15 not something I would do with a witness, get a signature, not
16 telling the witness that it was going to go -- be filed in a
17 federal court.

18 But the affirmative lie that it was going to be a
19 convenient way to start a dialogue should be met with the
20 harshest response for this Court because Mr. Boland when he
21 said that had no intention of starting a dialogue. He had
22 every intention of filing it the next morning with his papers
23 saying that --

24 **MAGISTRATE JUDGE FOSCHIO:** Okay.

25 **MR. SNYDER:** -- we discolored the document and

1 posting on his blog what he -- what he did for the obvious
2 purpose --

3 **MAGISTRATE JUDGE FOSCHIO:** Okay.

4 **MR. SNYDER:** -- of doing what this plaintiff and
5 his prior lawyers have done from day one, which was to use
6 fraudulent documents to try to coerce a settlement, you know,
7 in this attempted hold up that this case is.

8 So we think, Your Honor, that striking this
9 affidavit -- this declaration is the least that this Court
10 should do in the face of really indefensible conduct.

11 **MAGISTRATE JUDGE FOSCHIO:** Mr. Boland, based on
12 everything that's transpired here, do you want to withdraw
13 212?

14 Do you want to withdraw the Gianadda declaration,
15 that issue?

16 **MR. BOLAND:** No, Your Honor. In the interest of
17 respecting the Court's willingness to move on, which I think
18 is reasonable to do, I responded to all this, these baseless
19 allegations of lies, et cetera both in my declaration and in
20 my papers.

21 I would just ask this, Your Honor: They're asking
22 for Mr. Gianadda's original declaration to be stricken and the
23 altered declaration that they provided to -- to take its
24 place.

25 My concern about that alteration they made is not

1 actually the facts related to this case because Mr. Gianadda
2 reiterates in the altered declaration the same salient facts,
3 which is "the document was white when I first saw it."

4 What I -- what I think we would like to reserve the
5 right to object to use at trial is the rest of that document
6 where Mr. Gianadda goes into, assisted by lawyers for the
7 other side sort of *ad hominem*, "Mr. Boland wasn't forthright,
8 I felt like he mislead me," all that argument that is not
9 really pertinent to why he's involved in the case.

10 So we would actually ask that that document be
11 stricken entirely. But if the Court's not inclined to strike
12 Mr. Gianadda's --

13 **MAGISTRATE JUDGE FOSCHIO:** Which -- which? The
14 second --

15 **MR. BOLAND:** The second declaration.

16 **MAGISTRATE JUDGE FOSCHIO:** Well, you didn't make a
17 motion to that effect.

18 **MR. BOLAND:** No, but they're asking for a
19 replacement. One stricken and one to replace. We're saying
20 don't let them replace it.

21 **MAGISTRATE JUDGE FOSCHIO:** They're not asking.
22 They've already filed it. It's already filed.

23 **MR. BOLAND:** We would just like to reserve our
24 right to object to its use at trial in front of a jury because
25 of that extra material, which is not relevant to the case and

1 just as --

2 **MAGISTRATE JUDGE FOSCHIO:** Can I just ask a couple
3 of questions, if you care to answer?

4 **MR. BOLAND:** Yes.

5 **MAGISTRATE JUDGE FOSCHIO:** Why didn't you tell
6 Mr. Gianadda that you intended to file it with the Court?

7 **MR. BOLAND:** As I said in my papers, Your Honor, I
8 didn't tell him that because I didn't intend to file it.

9 **MAGISTRATE JUDGE FOSCHIO:** Really?

10 **MR. BOLAND:** My intent was at that time to obtain
11 that declaration, as I said in my papers, and wait for their
12 response to our motion regarding spoliation of the document.

13 Were they going to acknowledge that, yes,
14 unfortunately, we have determined --

15 **MAGISTRATE JUDGE FOSCHIO:** What prompted you to
16 file it then?

17 **MR. BOLAND:** Here's what prompted me, as I said in
18 my papers --

19 **MAGISTRATE JUDGE FOSCHIO:** Or put it on your blog
20 for that matter?

21 **MR. BOLAND:** Anything that's a filed document that
22 might be relevant to letting the public know what's going on
23 in the case. That's it .

24 The reason it did get filed, as I said in my
25 papers, is I had a conversation with Mr. Argentieri and with

1 my client and I recounted to them my concern that from my
2 first phone conversation with Mr. Gianadda, he was resolute,
3 he asked -- answered questions very promptly and said
4 "absolutely, the document was white when I saw it. I was 3
5 feet away."

6 And then the second call the following day he said,
7 "you know, after you called me Mr. Southwell called me and now
8 I'm concerned about getting in the middle of this " --

9 **MAGISTRATE JUDGE FOSCHIO:** Declarant remorse.

10 **MR. BOLAND:** Exactly, that's right. And then he
11 began to say things, as I recounted, that he started to feel
12 from whatever they were telling him and whatever they were
13 saying to him when they were leaning over him in Mr. Flynn's
14 office that, "I think I need their permission. Can we clear
15 this with Mr. Southwell?" He was conveying that idea to me.

16 I immediately became concerned and I should have,
17 if there was a place in Vegas to lay a bet on it, I should
18 have laid a bet, that they were going to interact with him, as
19 they admitted they did, and his declaration is going to
20 change. So before that happened --

21 **MAGISTRATE JUDGE FOSCHIO:** But you did file it with
22 the Court before their motion, didn't you?

23 **MR. BOLAND:** Say again.

24 **MAGISTRATE JUDGE FOSCHIO:** Didn't you file it
25 before the -- before they made their motion to strike?

1 **MR. BOLAND:** I did. I filed it immediately then,
2 which I had not intended to do.

3 **MAGISTRATE JUDGE FOSCHIO:** Why?

4 **MR. BOLAND:** Because I was convinced that based on
5 what he was telling me, he was being pressured by those
6 lawyers to change his story, and he did. It's exactly what I
7 thought was going to happen.

8 **MAGISTRATE JUDGE FOSCHIO:** So you already had the
9 declaration. What other value was there in filing it with the
10 Court?

11 **MR. BOLAND:** Oh, incredible value because we have a
12 motion pending that is asking for sanctions against them for
13 yellowing this document.

14 And Mr. Gianadda confirms --

15 **MAGISTRATE JUDGE FOSCHIO:** Well, you could have
16 filed it at any time in support of the motion. You didn't
17 have to file it with the Court.

18 **MR. BOLAND:** Well, the motion -- our motion was
19 already filed.

20 **MAGISTRATE JUDGE FOSCHIO:** I'm trying to understand
21 what the legal or tactical significance or benefit is of
22 filing that document at that particular point in time.

23 **MR. BOLAND:** I can explain, Your Honor.

24 **MAGISTRATE JUDGE FOSCHIO:** Good.

25 **MR. BOLAND:** First, I knew that a changed document

1 was on the horizon based on the pressure this witness was
2 expressing to me, tone of voice --

3 **MAGISTRATE JUDGE FOSCHIO:** You had the document in
4 your file.

5 **MR. BOLAND:** I did.

6 **MAGISTRATE JUDGE FOSCHIO:** Always a good thing.

7 **MR. BOLAND:** He's a neutral witness. He was paid
8 for by both sides.

9 **MAGISTRATE JUDGE FOSCHIO:** It's called impeachment
10 by inconsistent prior statement, I believe.

11 **MR. BOLAND:** He has no bias, and he provided
12 testimony which was favorable to my client and unfavorable to
13 them, which was the sin he committed that they had to correct.

14 **MAGISTRATE JUDGE FOSCHIO:** Well --

15 **MR. BOLAND:** That's why it was valuable. We
16 attached it to a motion where it was entirely relevant.

17 Now you don't have a biased witness saying the
18 document was white when we gave it to him. You have a neutral
19 witness.

20 **MAGISTRATE JUDGE FOSCHIO:** Yeah, but you could
21 certainly cross-examine him based on a prior inconsistent
22 statement. You didn't need to file it with the Court.

23 **MR. BOLAND:** Well, here's why we needed to file
24 it --

25 **MAGISTRATE JUDGE FOSCHIO:** Nothing in the rules of

1 evidence that required a prior inconsistent statement be filed
2 with the Court, right?

3 **MR. BOLAND:** That's correct, Your Honor. But
4 strategy-wise they're trying to get this case dismissed.

5 **MAGISTRATE JUDGE FOSCHIO:** I know that.

6 **MR. BOLAND:** Arguing that Mr. Ceglia yellowed the
7 document.

8 **MAGISTRATE JUDGE FOSCHIO:** So you thought you
9 could --

10 **MR. BOLAND:** I got to move now.

11 **MAGISTRATE JUDGE FOSCHIO:** You thought you could --
12 you thought you could persuade them not to do that by filing
13 the document?

14 **MR. BOLAND:** I couldn't persuade them at all, Your
15 Honor.

16 What I'm hoping to do is present --

17 **MAGISTRATE JUDGE FOSCHIO:** That's exactly my point.

18 **MR. BOLAND:** -- is to present evidence to the Court
19 that makes it impossible, which it does now for that
20 dismissal.

21 **MAGISTRATE JUDGE FOSCHIO:** All right. Say that
22 again. What makes it impossible? What?

23 **MR. BOLAND:** I was hoping to present evidence to
24 the Court, a conglomeration of evidence to the Court that
25 makes it factually unsupportable for them to file this motion

1 to try and dismiss this case claiming Ceglia yellowed this
2 document before they got it. That's what the point of that
3 was.

4 They're going-- that's what they're -- they've been
5 broadcasting --

6 **MAGISTRATE JUDGE FOSCHIO:** But you have motions
7 that we haven't resolved yet on that score.

8 **MR. BOLAND:** Right.

9 **MAGISTRATE JUDGE FOSCHIO:** So I'm not sure what you
10 meant by -- I don't get the connection between the Gianadda --
11 filing of that Gianadda declaration and your inability to
12 argue that -- that yellowing issue.

13 **MR. BOLAND:** Oh, no, I'm not claiming there's an
14 inability to argue.

15 **MAGISTRATE JUDGE FOSCHIO:** Oh, I misunderstood you.

16 **MR. BOLAND:** Not at all.

17 **MAGISTRATE JUDGE FOSCHIO:** Okay, fine.

18 **MR. BOLAND:** Yes.

19 **MAGISTRATE JUDGE FOSCHIO:** All right. I'm not
20 persuaded to grant the motion, Mr. Snyder. I've got two
21 affidavits or two declarations. I don't condone, I don't
22 encourage the lack of candor between Mr. Boland and
23 Mr. Gianadda, but I -- I just don't see any just -- I don't
24 see enough justification, I guess is the real word, to strike
25 it. Two affidavits and they speak for themselves.

1 The motion is denied.

2 All right. Now, what else do we -- what's the next
3 issue we have to resolve here? Any other defendants' motion,
4 Mr. Snyder?

5 **MR. SNYDER:** That's it, Your Honor.

6 **MAGISTRATE JUDGE FOSCHIO:** Okay. Well, let's move
7 to the plaintiff's. What do you want to take first,
8 Mr. Boland?

9 **MR. BOLAND:** Your Honor, I think the motion for
10 sanctions against the defendants for their damage to the
11 Facebook, the Ceglia/Zuckerberg contract first would be
12 appropriate. It's the most serious situation that they're
13 facing.

14 **MAGISTRATE JUDGE FOSCHIO:** Okay. Pardon me? 213,
15 yeah. Well, let me express a question to help you.

16 **MR. BOLAND:** Very well.

17 **MAGISTRATE JUDGE FOSCHIO:** Are we not premature
18 with all this?

19 **MR. BOLAND:** No, Your Honor, we're not.

20 **MAGISTRATE JUDGE FOSCHIO:** Well, you obviously get
21 my drift. Tell me why we're not premature.

22 **MR. BOLAND:** Because from this point forward --

23 **MAGISTRATE JUDGE FOSCHIO:** And for anybody that
24 wonders why we shouldn't wait for the motion and then deal
25 with it at that time?

1 **MR. BOLAND:** Because, Your Honor, throughout this
2 case so far with the one-sided discovery, Mr. Ceglia has
3 unfairly been receiving a pummelling for alleged frauds absent
4 any evidence.

5 One of them has been this precise issue, and I
6 think that --

7 **MAGISTRATE JUDGE FOSCHIO:** Well, I can't imagine
8 that his personal sensitivity over being pummeled in this case
9 is a grounds under the Federal Rules of Civil Procedure to
10 warrant a court ruling on a preemptive issue of -- well, go
11 ahead.

12 **MR. BOLAND:** It goes to fairness, Your Honor.

13 **MAGISTRATE JUDGE FOSCHIO:** I mean, look, I guess
14 maybe there's even a baser question. I'm trying to facilitate
15 discussion here.

16 Where is the spoliation?

17 **MR. BOLAND:** The spoliation is we now have a
18 document as a result of the defendants' experts' either gross
19 negligence or intentional acts that is brown -- yellow to
20 brown on the face --

21 **MAGISTRATE JUDGE FOSCHIO:** Discolored. Discolored.
22 Discolored?

23 **MR. BOLAND:** It is discolored. And as the images
24 indicate, it's discolored a particular hue, it's a
25 yellow-brown. It's not discolored red or blue. It's actually

1 yellow.

2 **MAGISTRATE JUDGE FOSCHIO:** Well, you're -- you're
3 sort of nudging up to the question that I'm trying to get at,
4 and that is is the document illegible?

5 **MR. BOLAND:** Actually, it's not that it's
6 illegible. It's that they have now created a feature of the
7 document --

8 **MAGISTRATE JUDGE FOSCHIO:** So where is the
9 spoliation?

10 **MR. BOLAND:** The spoliation comes about that this
11 is the critical document in this case and they've damaged it
12 first --

13 **MAGISTRATE JUDGE FOSCHIO:** Where is the
14 spoliation?

15 **MR. BOLAND:** The spoliation comes about from them
16 not being entitled to damage the evidence.

17 **MAGISTRATE JUDGE FOSCHIO:** Is it not intact?

18 **MR. BOLAND:** It is not intact.

19 **MAGISTRATE JUDGE FOSCHIO:** It's not intact?

20 **MR. BOLAND:** No.

21 **MAGISTRATE JUDGE FOSCHIO:** You mean there's missing
22 text that has been destroyed somehow?

23 **MR. BOLAND:** There's a missing color from the
24 front of both pages that was there originally. It's gone.

25 **MAGISTRATE JUDGE FOSCHIO:** How -- how -- how does

1 the -- the -- the discoloration make the document either less
2 probative, if you will, if I can use the technical term, from
3 the plaintiff's point of view?

4 **MR. BOLAND:** I can tell you, Your Honor,
5 because --

6 **MAGISTRATE JUDGE FOSCHIO:** Yes, I wish you would
7 because it's not discussed in the papers, is it?

8 **MR. BOLAND:** The sanctions --

9 **MAGISTRATE JUDGE FOSCHIO:** Excuse me. Is it?

10 **MR. BOLAND:** The sanctions --

11 **MAGISTRATE JUDGE FOSCHIO:** Excuse me. It's not
12 discussed in the papers, is it? This point that we're --

13 **MR. BOLAND:** It is, Your Honor.

14 **MAGISTRATE JUDGE FOSCHIO:** It is discussed?

15 **MR. BOLAND:** Near the end.

16 **MAGISTRATE JUDGE FOSCHIO:** Oh, at the end. Hmm.

17 **MR. BOLAND:** I comment about why this is
18 spoliation for which they should suffer some sanction, and
19 that is because now they have an argument to this Court that
20 they can make and to a jury that they can make that without
21 even saying anything, just handing the document to the jury or
22 even to this Court for review would cause the Court to say,
23 "wow, this looks like somebody is trying to manipulate this
24 document. It doesn't look like documents the Court has
25 regularly signed with -- that are brown on one side or yellow

1 and white on the other side."

2 **MAGISTRATE JUDGE FOSCHIO:** They can make a lot
3 of arguments.

4 **MR. BOLAND:** It's not the argument, Your Honor.
5 It's the document itself gives off the impression that it has
6 been doctored for some purpose and that's what they're arguing
7 has happened.

8 And our position is they shouldn't be entitled to
9 argue that --

10 **MAGISTRATE JUDGE FOSCHIO:** Is that spoliation or is
11 that something else?

12 **MR. BOLAND:** Absolutely. They've damaged the
13 document to give themselves an argument they otherwise
14 wouldn't have, yes, that's absolutely spoliation.

15 They've taken the color off the front of it, which
16 they're not entitled to do, that was there when they got it
17 and now they're going to turn around and say that --

18 **MAGISTRATE JUDGE FOSCHIO:** Do you have any cases
19 that say something like that?

20 **MR. BOLAND:** That say something like what, Your
21 Honor?

22 **MAGISTRATE JUDGE FOSCHIO:** That -- that -- that
23 altering the color of a document is spoliation of the
24 document.

25 **MR. BOLAND:** Well, I would say in the reverse,

1 Your Honor, I think it's their burden to show how they're
2 entitled to alter a document and it's not considered -- the
3 key document in this case, and it's not considered spoliation
4 in this way.

5 **MAGISTRATE JUDGE FOSCHIO:** Isn't it -- isn't it --
6 isn't this discoloration an evidentiary issue arguably now
7 that it's in the case that goes to the authenticity of the
8 document?

9 And isn't that the ultimate question for the jury?

10 **MR. BOLAND:** You're zooming right in on it, Your
11 Honor. It's now an authenticity issue that they have inserted
12 into the document that they're going to argue my client put
13 into the document. There's the unfairness.

14 How are they entitled to alter --

15 **MAGISTRATE JUDGE FOSCHIO:** Well, can't you argue
16 that to the jury?

17 **MR. BOLAND:** Your Honor, the facts are --

18 **MAGISTRATE JUDGE FOSCHIO:** Won't you argue it to
19 the jury if the case goes to trial?

20 **MR. BOLAND:** If the Court -- if the Court won't
21 direct the jury that it was damaged in their possession, I'll
22 be forced to.

23 And now look where I'm at. I'm not in the position
24 I was when we gave them the document. I'm now behind -- I'm
25 unfairly pushed back a little bit on authenticity because they

1 can argue look at the yellow. He did it. When we know from
2 their evidence they did it.

3 **MAGISTRATE JUDGE FOSCHIO:** Isn't the authenticity
4 of the document ultimately for the jury?

5 **MR. BOLAND:** Absolutely.

6 **MAGISTRATE JUDGE FOSCHIO:** Isn't the authenticity
7 of the document ultimately for the jury?

8 **MR. BOLAND:** It is, Your Honor, but not based on
9 yellowing. They can't be allowed to say the yellowing is
10 something to take into an account about authenticity when they
11 put it there. That's the -- that is the fraud that's -- not
12 fraud.

13 That's the unfairness that's going on here.

14 **MAGISTRATE JUDGE FOSCHIO:** But isn't it obvious
15 from the papers that there's going to be two sides to this
16 story?

17 **MR. BOLAND:** Respectfully, Your Honor, their own
18 images show otherwise. There's not two sides.

19 If you look at the exhibit that Mr. Tytell and Mr.
20 Lesnevich submitted and I excerpted it in my papers, Mr.
21 Tytell, their expert, took a picture of the document early on,
22 it looks roughly white.

23 24 hours later their expert took a picture, it now
24 looks yellow. There's no debate here. Those are their
25 experts telling this Court we damaged this document.

1 So to say it's kind of a toss up, nobody really
2 knows how it really happened, is for them to ignore the
3 evidence. It's their evidence that tells us, along with the
4 videotape, along with Mr. Argentieri, along with the silence
5 of every one of their representatives that was in that room
6 who are not coming forward to say the document was all brown
7 and yellow like it looks now when we first got it. None of
8 them are saying that.

9 **MAGISTRATE JUDGE FOSCHIO:** Well, you're prepared
10 to -- you are prepared to prove just that point. That's what
11 your papers show and it doesn't seem to me that you're
12 prejudiced in any way from doing so.

13 They will put their proof in on the issue. The
14 trial judge, whoever it is, will decide -- will give an
15 instruction at the parties' request as to the role of the jury
16 and how they're to evaluate such evidence, which will be
17 primarily based on expert opinion, no doubt.

18 And the jury will consider it among other factors
19 in whether or not the document is authentic.

20 **MR. BOLAND:** That's true, Your Honor, but I
21 think --

22 **MAGISTRATE JUDGE FOSCHIO:** And to ask the Court on
23 a motion like this, which is essentially like an *in limine*
24 motion to decide a critical issue in the case and take those
25 issues away from the trier of the fact or to -- or to dispose

1 of them without a motion to which the issue relates, i.e., a
2 motion to dismiss based on fraud or whatever, is to me quite
3 extravagant.

4 **MR. BOLAND:** The evidence here --

5 **MAGISTRATE JUDGE FOSCHIO:** Don't you think?

6 **MR. BOLAND:** -- makes it not extravagant at all
7 because it's all one-sided. It's very easy for the Court to
8 look at their own experts' images and say, "you guys yellowed
9 the document, I'm not going to permit you to say to a jury or
10 to the Court in a motion to dismiss the yellowing is a factor
11 you should consider to dismiss this case against my client.
12 He did it."

13 That's just unfair. They put the yellowing in
14 there and now they can argue --

15 **MAGISTRATE JUDGE FOSCHIO:** They're going to have to
16 show that your client was responsible for the yellowing in
17 order for your argument to make sense, correct?

18 **MR. BOLAND:** For their argument to make sense,
19 yes.

20 **MAGISTRATE JUDGE FOSCHIO:** For your argument to
21 make sense that you're prejudiced, that you were pushed back
22 because if the Court -- if I refuse to find that this is
23 spoliation, now you have to do something with this.

24 But you don't have to do anything with it until
25 they attempt to attribute the yellowing to Mr. Ceglia.

1 **MR. BOLAND:** And that's our point.

2 **MAGISTRATE JUDGE FOSCHIO:** I'm not sure they
3 have -- they have successfully established that. That's one
4 thing I'm curious to see, exactly how did Mr. Ceglia
5 accomplish this feat.

6 **MR. BOLAND:** Maybe this can be alleviated this
7 way, Your Honor. I have a motion prepared, which I'm not
8 intending to file at any point --

9 **MAGISTRATE JUDGE FOSCHIO:** No, no, stick with this
10 -- stick with this issue.

11 **MR. BOLAND:** It relates to this, yes.

12 If the Court would be willing to give us a 60 day
13 window after they submit their expert reports so we can
14 perhaps do discovery, et cetera --

15 **MAGISTRATE JUDGE FOSCHIO:** Excuse me. Don't you
16 agree that they have not established that Mr. Ceglia is
17 responsible for the -- for any discoloration?

18 **MR. BOLAND:** I agree to that, and I agree we've
19 established they did it --

20 **MAGISTRATE JUDGE FOSCHIO:** Well --

21 **MR. BOLAND:** -- both of those.

22 **MAGISTRATE JUDGE FOSCHIO:** -- if it turns out that
23 they can't attribute the discoloration to Mr. Ceglia, how does
24 the issue even get provoked in front of the jury?

25 **MR. BOLAND:** Here's how it gets provoked. If

1 I hand -- if we hand jurors a copy of this document now and
2 say nothing and the Court orders both parties "you can't say
3 anything about its yellowed nature," they're going to look at
4 it and flip it over and immediately assume something's wrong
5 with this, this doesn't look authentic because I've never
6 signed a document that's yellow on one side.

7 And they put the yellow there, there should be an
8 instruction to the jury.

9 **MAGISTRATE JUDGE FOSCHIO:** Actually, actually I
10 think most people would assume it works to your favor because
11 a juror looking at the document would think, well, it's --
12 it's -- it's not fresh white paper out of the -- out of a -- a
13 box. It's been around for eight years, you know, it's bound
14 to have been discolored.

15 **MR. BOLAND:** I agree with that except for this,
16 Your Honor, the point is it's only yellow on one side. So now
17 it doesn't look like it's been laying on the front lawn like a
18 newspaper. It's on one side only. Something doesn't look
19 right.

20 And the jurors are immediately going to say, "hmm,
21 I don't know about this plaintiff's case because the document
22 looks funny already."

23 And they caused it to look that way and they're
24 going to get the benefit even if they're not allowed to argue
25 it.

1 **MAGISTRATE JUDGE FOSCHIO:** Well, you could ask for
2 a curative instruction.

3 **MR. BOLAND:** That's what I'm asking for in our
4 motion.

5 **MAGISTRATE JUDGE FOSCHIO:** Well, that's exactly --
6 but we're not here for trial. I'm not authorized to make
7 *in limine* motions -- or to consider *in limine* motions.

8 **MR. BOLAND:** But I'm also --

9 **MAGISTRATE JUDGE FOSCHIO:** Or to -- or to direct
10 the district judge what his cautionary instruction should
11 sound like.

12 **MR. BOLAND:** But I'm also asking because the Court
13 will entertain, if they file it, a motion to dismiss on
14 fraud --

15 **MAGISTRATE JUDGE FOSCHIO:** Look, I'm here to decide
16 whether or not there's been spoliation, and when do we talk
17 about whether or not -- assume for the sake of discussion that
18 discoloration in law is a form of spoliation -- and I'm not
19 convinced that it is -- I'm thinking it more goes to the -- to
20 the weight of the evidence and that any potential or
21 misunderstanding by the jury can be resolved with a curative
22 instruction by -- a joint curative instruction, but certainly
23 one by you, that absent their proof that this is part of the
24 fraud, which the question whether they've got the proof is to
25 be determined, that -- that it can in any way, shape or form

1 be viewed as a form of spoliation.

2 The document is all there. It's intact. The
3 signatures are there. The text is complete. No pages have
4 been torn in half or text has not been rendered illegible. I
5 just -- I'm wondering whether we're talking about a horse, you
6 know, a -- a different breed of cat here, so to speak.

7 **MR. BOLAND:** Well, I don't want to --

8 **MAGISTRATE JUDGE FOSCHIO:** But tell me -- but tell
9 me about the negligence. I understand about the *DeGeorge*
10 case, I understand about -- we have to be careful here, assume
11 for the sake of discussion that this is some sort of a
12 spoliation issue.

13 Where -- where is there any evidence of any intent
14 or -- or -- or negligence by the defendant in -- in conducting
15 the test? I mean, the UV equipment is standard. It's
16 advertised. Your own experts advertise it's non destructive.

17 I just fail to see where there's anything in here
18 that suggests that they did anything wrong.

19 **MR. BOLAND:** Here's -- here's where it is, Your
20 Honor. They --

21 **MAGISTRATE JUDGE FOSCHIO:** We'll talk about the
22 fingerprint issue a little bit later. But I'm just talking
23 about it has to be the UV, if anything, correct? Yes?

24 **MR. BOLAND:** Yes, it's the UV light. Because as --
25 exactly. Here's where the gross negligence or intentionality

1 comes in --

2 **MAGISTRATE JUDGE FOSCHIO:** No, no. We know that
3 that's not the test under the *DeGeorge* case. It's negligence,
4 that's what the Second Circuit reversed Judge Arterton on.

5 **MR. BOLAND:** Correct, Your Honor. And if you
6 found intentional, that's better than negligence, so it's
7 gross negligence.

8 **MAGISTRATE JUDGE FOSCHIO:** Yeah, but it's one of
9 the two, you know.

10 **MR. BOLAND:** And the negligence -- okay, the
11 negligence -- okay. We'll use that term --

12 **MAGISTRATE JUDGE FOSCHIO:** You have no evidence
13 that it was intentionally done, do you?

14 **MR. BOLAND:** Only circumstantial, Your Honor, and
15 that is --

16 **MAGISTRATE JUDGE FOSCHIO:** What's that?

17 **MR. BOLAND:** I'll tell you. We had qualified
18 experts, allegedly, who our experts observed as they said in
19 their declarations. Exposure of this document to UV light in
20 normal testing doesn't damage it.

21 Our experts say the same thing as their experts.
22 Typical UV light from these machines, no problem. Just like a
23 typical walk from here to the parking garage in the sunlight,
24 not going to hurt you.

25 If you lay out on a summer day for eight hours in

1 the sunlight, now you might have a problem. It's the
2 overexposure which they don't address.

3 **MAGISTRATE JUDGE FOSCHIO:** Define "overexposure"
4 in the context of examining a challenged document.

5 **MR. BOLAND:** Enough to make it yellow on one side I
6 think qualifies. That's it. And the hours of overexposure
7 which the videotape reveals, and we detailed just some of it
8 in our exhibit to our papers, and our experts observed them
9 overexposing the document.

10 And here's the key, Your Honor: None of their
11 experts said we didn't overexpose it. All they said was
12 normal exposure will never hurt a document.

13 Well, we agree with that just like a normal walk in
14 the sun's not going to give you sunburn. That's -- they're
15 running from the issue. Not one of their experts came forward
16 with his credibility on the line and said the hours and hours
17 over four days that we did repeated tests, more than have ever
18 been done on a document like this, according to both our
19 experts, that wasn't enough overexposure to UV light to damage
20 the document.

21 That's simply false because the document tells you
22 they overexposed it. That's negligence. They should have
23 gone in there, all huddled around, run the tests a couple of
24 times so that they're all satisfied and go on.

25 Instead, they had expert after expert come in each

1 day and do all the tests over again and over again and over
2 again. And that's what it is --

3 **MAGISTRATE JUDGE FOSCHIO:** Was the plaintiff
4 represented during the testing process?

5 **MR. BOLAND:** The plaintiff was represented and was
6 excluded from getting anywhere near testing.

7 **MAGISTRATE JUDGE FOSCHIO:** Well, they weren't in
8 the room?

9 **MR. BOLAND:** They were in the room and sometimes
10 not in the room, but they were shooed away, as Mr. Argentieri
11 indicated, by lawyers saying, "Get away from our experts. You
12 can't even know what our machines are set for."

13 **MAGISTRATE JUDGE FOSCHIO:** Well, who was -- who was
14 present during all of the hours of UV exposure that we're
15 talking about on behalf of the plaintiff?

16 **MR. BOLAND:** My recollection is Mr. Argentieri was
17 there for the entirety of the four days.

18 **MAGISTRATE JUDGE FOSCHIO:** Mm-hmm.

19 **MR. BOLAND:** And then our experts, Mr. Stewart and
20 Mr. Blanco, I don't recall precisely how many days they were
21 there, but I don't believe they were there all four days, the
22 two of them.

23 **MAGISTRATE JUDGE FOSCHIO:** So they were aware that
24 the document was being subjected to UV testing?

25 **MR. BOLAND:** Correct. And in their opinion they

1 were saying, as their declarations indicate, they were talking
2 to plaintiff's counsel saying, "What are they doing? They're
3 going way overboard on this document."

4 But any attempt Mr. Argentieri made to go over and
5 inquire, "What are you doing, et cetera," lawyers like
6 Ms. Aycock said, "Get out of here, don't come near the
7 document, you're not welcome," and backed them off the room.

8 **MAGISTRATE JUDGE FOSCHIO:** Did they object to
9 the -- did they express an objection to the over -- potential
10 for overexposure?

11 **MR. BOLAND:** No one expressed or called the Court
12 or expressed any objection.

13 **MAGISTRATE JUDGE FOSCHIO:** Well, was there any
14 objection expressed to the experts or Ms. Aycock or who --
15 whatever lawyer was representing the defendant?

16 **MR. BOLAND:** Mr. Argentieri approached experts and
17 lawyers on a couple of occasions in that room and was told,
18 "You can't even look over their shoulder. Get away from us."

19 So he didn't have any opportunity to communicate
20 with any of them because they cut him off from that. They
21 wouldn't even tell them what they were doing.

22 **MAGISTRATE JUDGE FOSCHIO:** He couldn't shout out
23 and say, you know, "You're destroying the document with
24 excessive UV radiation, don't you know it? You're spoliating
25 the document."

1 **MR. BOLAND:** He didn't shout that out, Your Honor,
2 and it was discovered by the time they got to Chicago that it
3 had been damaged.

4 **MAGISTRATE JUDGE FOSCHIO:** When we negotiated with
5 Mr. Lake for the protocols for testing, I don't recall this
6 issue being broached by Mr. Lake.

7 **MR. BOLAND:** But prior to the experts testing --

8 **MAGISTRATE JUDGE FOSCHIO:** It's not in the
9 protocol, as I recall.

10 **MR. BOLAND:** It isn't, Your Honor. It's very -- it
11 wouldn't be reasonable for an attorney to expect that Facebook
12 would hire experts that would treat this like college kids at
13 a party.

14 **MAGISTRATE JUDGE FOSCHIO:** That didn't -- know what
15 they were doing. They didn't know what they were doing.

16 **MR. BOLAND:** They were throwing the document on top
17 of computers, they were sticking their fingers on it, which
18 we'll talk about later.

19 **MAGISTRATE JUDGE FOSCHIO:** Well, not too much later
20 I hope.

21 **MR. BOLAND:** And now they're overexposing it.
22 They're overexposing it. So that's really the issue. They
23 don't dodge overexposure. They're essentially acknowledging
24 it.

25 **MAGISTRATE JUDGE FOSCHIO:** You don't concede at all

1 that the plaintiff could be perceived as having acquiesced in
2 the testing procedure?

3 **MR. BOLAND:** To the testing procedure, yes. To
4 overexposing the document, never.

5 **MAGISTRATE JUDGE FOSCHIO:** Including the --
6 including the UV testing.

7 **MR. BOLAND:** He consented to the UV testing, but
8 not excessive UV testing which they obviously did. I mean, he
9 would never consent to that. There's no way he said, "Go
10 ahead, light that thing up for eight hours a day under UV
11 light, I don't care," no.

12 **MAGISTRATE JUDGE FOSCHIO:** There was no point in
13 time during the scenario that if there was serious concern
14 about potential spoliation, as you -- as you assert, that the
15 Court could not have been contacted, there could have been a
16 demand to cease and desist on the excessive UV testing?

17 **MR. BOLAND:** There could have been, Your Honor.

18 **MAGISTRATE JUDGE FOSCHIO:** But there wasn't?

19 **MR. BOLAND:** There wasn't. And here's an important
20 timing issue with that. It was 24 hours later, based on their
21 experts' documents, the document was already ruined.

22 So Mr. Argentieri had a day of watching it be
23 analyzed, he had never done this before, he had never been
24 involved in document analysis --

25 **MAGISTRATE JUDGE FOSCHIO:** Whose problem is that?

1 **MR. BOLAND:** I guess he didn't pick clients who
2 have contract cases like this. I don't know. I don't know --
3 I don't know why he has the problem of never being involved in
4 these.

5 **MAGISTRATE JUDGE FOSCHIO:** I mean, certainly the
6 defendant can't be faulted in some way for having
7 Mr. Argentieri, who didn't understand the potential
8 implications of excessive UV testing on a billion dollar
9 document, for being the only representative of the plaintiff.

10 **MR. BOLAND:** Your Honor, he credited their experts
11 with some ability to do their job correctly. That's not
12 unreasonable for him to say, "I assume they know what they're
13 doing," instead of looking over their shoulder.

14 **MAGISTRATE JUDGE FOSCHIO:** How about your experts?
15 Your experts simply expressed something to Mr. Argentieri, but
16 not to Mr. -- what was his name? Tynell?

17 **MR. BOLAND:** Tytell.

18 **MAGISTRATE JUDGE FOSCHIO:** Tytell.

19 **MR. BOLAND:** Yes. They weren't permitted to.
20 They were told to sit mute in the corner and don't interact.
21 So they're not lawyers, they don't know what the Court's order
22 is. They just sat there on their hands, made comments to
23 plaintiff's counsel and observed. And they were aghast at
24 what these so-called experts were doing to this document.

25 And we know why: They damaged it.

1 **MAGISTRATE JUDGE FOSCHIO:** That was back in July?

2 **MR. BOLAND:** Was back in July, 14th through the
3 19th. There was a couple days off there.

4 **MAGISTRATE JUDGE FOSCHIO:** When was your motion
5 made?

6 **MR. BOLAND:** Regarding the spoliation? I don't
7 recall the date. Probably six -- oh, actually, I do recall
8 the date. November 1st it was filed.

9 **MAGISTRATE JUDGE FOSCHIO:** Took you several months
10 to figure out you had a problem?

11 **MR. BOLAND:** Well, I can't speak for the other
12 lawyers. As soon as I saw the videotape, which showed the
13 document white and I knew it was now yellow, it was pretty
14 obvious who had done it at that point.

15 I moved quickly as soon as I discovered that
16 information.

17 **MAGISTRATE JUDGE FOSCHIO:** That's it on spoliation?

18 **MR. BOLAND:** In addition to what's in my papers,
19 Your Honor, yes.

20 **MAGISTRATE JUDGE FOSCHIO:** But that's really the
21 sum and substance of it, isn't it?

22 **MR. BOLAND:** That's correct, Your Honor. I think
23 there's damage to that document that they're going to take
24 advantage of in this trial when we get in front of a jury and
25 I think that's unfair.

1 **MAGISTRATE JUDGE FOSCHIO:** The UV equipment is
2 standard?

3 **MR. BOLAND:** The equipment they used I think is --
4 our experts would agree is the standard equipment used.

5 **MAGISTRATE JUDGE FOSCHIO:** Do you know of any
6 operating manuals that warn against excessive UV exposure in
7 testing a subject document?

8 **MR. BOLAND:** Actually, yes, we submitted exhibits
9 to our experts' declarations, which detailed articles that
10 tested excessive UV and what it does -- the damage it does to
11 documents. So their experts were aware.

12 **MAGISTRATE JUDGE FOSCHIO:** But I'm talking about
13 using this particular piece of equipment that experts use
14 routinely in this line of work.

15 **MR. BOLAND:** I'm not aware of an operating manual
16 that warns against it, but the general field of document
17 examination, they all know excessive UV exposure does this
18 kind of damage.

19 **MAGISTRATE JUDGE FOSCHIO:** Using a standard
20 industry accepted testing instrument such as the one that was
21 used in this case?

22 **MR. BOLAND:** Absolutely, using the sunlight, using
23 a light you buy from Walmart, any UV exposure that's excessive
24 is going to cause this to happen. Doesn't matter --

25 **MAGISTRATE JUDGE FOSCHIO:** Well, sunlight is

1 sunlight, I have no idea what the UV device is in the testing
2 equipment that's at issue here.

3 **MR. BOLAND:** And neither do we actually know how
4 high intensity bulb they used or what its settings were. They
5 wouldn't allow us to know that.

6 **MAGISTRATE JUDGE FOSCHIO:** Well, how about your
7 experts? Don't they know?

8 **MR. BOLAND:** Well, the bulb that can be inside that
9 device, the UV light source, can be multiple different ones
10 you can stick in there and you can use a computer to set its
11 intensity. And we weren't allowed access to any of those
12 settings. They wouldn't tell our experts or anyone what they
13 were doing. So we don't know that.

14 **MAGISTRATE JUDGE FOSCHIO:** Have you completed your
15 testing of the document?

16 **MR. BOLAND:** As far as the stuff that would require
17 a UV machine, yes, I believe we've concluded our testing.
18 There might be some further ink testing that's still going on,
19 but I don't think we need to put it in those machines anymore
20 and I don't know if it would really help at this point because
21 of the damage.

22 But I can confirm that with our experts.

23 **MAGISTRATE JUDGE FOSCHIO:** You're not sure? I
24 mean --

25 **MR. BOLAND:** I don't know of any, yeah.

1 **MAGISTRATE JUDGE FOSCHIO:** -- to your knowledge the
2 document is still being tested by the plaintiff's experts?

3 **MR. BOLAND:** In what way? No, it's just --

4 **MAGISTRATE JUDGE FOSCHIO:** In any way.

5 **MR. BOLAND:** -- it's just being held. It's not
6 being tested.

7 **MAGISTRATE JUDGE FOSCHIO:** Okay.

8 **MR. BOLAND:** It's just being held.

9 **MAGISTRATE JUDGE FOSCHIO:** Well, did your experts
10 say that their ability to test the document to determine its
11 authenticity was impaired because of the discoloration
12 problem?

13 **MR. BOLAND:** One of our experts says that it would
14 impair some ink testing. The other one thinks that maybe we
15 could still -- it's still -- one of our experts says that the
16 condition of the document that was brought on by the
17 defendants' conduct now prohibits some ink testing.

18 The other expert says he thinks, and this is how
19 these experts are in this world, he might be able to still
20 complete accurately to a *Daubert* standard some of the ink
21 testing. We don't know yet.

22 We're kind of waiting for these motions to work
23 their way out and then we're going to decide what to do from
24 there because, frankly, at this point we might have to just at
25 least inform the Court and the defendants what testing we

1 intend to do because of the results being messed up from this
2 treatment of the document that they gave.

3 And, Your Honor, it's not only the yellowing, but
4 you saw the video clips we submitted. It's the casual way
5 these experts handled that document. Showed no respect for
6 the gravity of what it means to this case, which leads us to
7 negligence and gross negligence.

8 Nowhere in any of their manuals does it say set
9 this on top of a computer, stick it on the table and put your
10 hands on it. They just had no respect for it, so that's what
11 led us to think they can't be bad experts that are this bad,
12 this must be intentional or at least gross negligence to
13 behave this way with what the Court has correctly said is a
14 billion dollar document.

15 **MAGISTRATE JUDGE FOSCHIO:** And then some.

16 **MR. BOLAND:** Yes, and then some.

17 **MAGISTRATE JUDGE FOSCHIO:** All right.

18 **MR. BOLAND:** Thank you.

19 **MAGISTRATE JUDGE FOSCHIO:** Thank you.

20 **MR. SNYDER:** Your Honor --

21 **MAGISTRATE JUDGE FOSCHIO:** Is this spoliation?

22 **MR. SNYDER:** Your Honor, I was -- I was -- I was --
23 I was taught by my mentors to not get angry in court and --

24 **MAGISTRATE JUDGE FOSCHIO:** You had good mentors.
25 You were taught well.

1 **MR. SNYDER:** In this instance -- yes, so I'm going
2 to -- I'm going to restrain my -- my -- my feelings and simply
3 tell the Court that what you just heard is outrageous, and I
4 will demonstrate that what Mr. Boland told you is knowingly
5 outrageous.

6 Let me tell you, Your Honor --

7 **MAGISTRATE JUDGE FOSCHIO:** First of all, is it
8 spoliation?

9 **MR. SNYDER:** What this plaintiff did to the
10 document before it was produced for inspection, before it was
11 produced for inspection, before our experts ever touched it,
12 or subjected it to ultraviolet rays, before they ever
13 conducted any tests on it, what this plaintiff and/or persons
14 acting in concert with him did to this original document,
15 before we ever saw it was spoliation.

16 Because what was done to the document before we
17 ever saw it or tested it was the ink was faded by the
18 plaintiff and/or others acting in concert with him --

19 **MAGISTRATE JUDGE FOSCHIO:** Would you just walk me
20 through -- I didn't -- I didn't want to jump ahead or --

21 **MR. SNYDER:** Let me --

22 **MAGISTRATE JUDGE FOSCHIO:** -- or interfere with
23 Mr. Boland's presentation. The complaint was filed -- the
24 date again in June or July --

25 **MR. SNYDER:** The complaint was filed in July of --

1 June of 2010.

2 **MAGISTRATE JUDGE FOSCHIO:** Right.

3 **MR. SNYDER:** And the sequence of events is in
4 January 2011 --

5 **MAGISTRATE JUDGE FOSCHIO:** Did that --

6 **MR. SNYDER:** -- the plaintiff's own expert, Valery
7 Aginsky, described the ink on page 1 --

8 **MAGISTRATE JUDGE FOSCHIO:** No, no, just -- just
9 back up. The complaint was filed with the document.

10 **MR. SNYDER:** Yes.

11 **MAGISTRATE JUDGE FOSCHIO:** There came a point in
12 time when the document was subjected to a high resolution or
13 high-density photograph.

14 **MR. SNYDER:** That was true -- yes, can I give Your
15 Honor this chronology? It will take one --

16 **MAGISTRATE JUDGE FOSCHIO:** I'm just trying to
17 understand, yes.

18 **MR. SNYDER:** If you'll bear with me I'll give it to
19 you on a silver platter.

20 **MAGISTRATE JUDGE FOSCHIO:** Good, good. It's
21 important, I think, for Mr. Boland --

22 **MR. SNYDER:** Yes.

23 **MAGISTRATE JUDGE FOSCHIO:** -- for some reason I
24 think when I talked about the clash of opinion as to who
25 spoliated when --

1 **MAGISTRATE JUDGE FOSCHIO:** There's no clash of --
2 let me just say, Your Honor, first -- can I just start from
3 the outset before we get to the merits?

4 **MAGISTRATE JUDGE FOSCHIO:** Go ahead. All right.

5 **MR. SNYDER:** It's very important I think to frame
6 this.

7 **MAGISTRATE JUDGE FOSCHIO:** Go ahead.

8 **MR. SNYDER:** The very purpose of the expedited
9 discovery orders entered by this Court and upheld by the
10 district judge is to enable defendants to uncover evidence of
11 plaintiff's fraud and to present that evidence to the Court.

12 Mr. Boland casually says, I think, in disrespect of
13 this process, that this is "one-sided discovery absent any
14 evidence."

15 If that were true, Your Honor, and Judge Arcara
16 would have acted lawlessly in issuing the order that was
17 issued because that order was issued on July 1st and, again,
18 on -- the second order was issued in -- in August?

19 **MS. AYCOCK:** August 18th.

20 **MR. SNYDER:** August 18th based on substantial
21 evidence of fraud.

22 **MAGISTRATE JUDGE FOSCHIO:** Well --

23 **MR. SNYDER:** And so -- so the notion that we are in
24 a "one-sided discovery process, absent any evidence" is
25 contemptuous of the process.

1 Moreover --

2 **MAGISTRATE JUDGE FOSCHIO:** It is one-sided.

3 **MR. SNYDER:** Rightly so based on the record before
4 this Court, based on substantial authority --

5 **MAGISTRATE JUDGE FOSCHIO:** Which isn't necessarily
6 evidence.

7 **MR. SNYDER:** Well, based on the -- based on the
8 record before this Court, there was ample basis for issuing
9 the order, as Your Honor and Judge Arcara both held.

10 What plaintiff is now asking this Court to do --

11 **MAGISTRATE JUDGE FOSCHIO:** Just tell me about how
12 the document, the original document --

13 **MR. SNYDER:** Yes.

14 **MAGISTRATE JUDGE FOSCHIO:** -- came to be
15 examined --

16 **MR. SNYDER:** Yes.

17 **MAGISTRATE JUDGE FOSCHIO:** -- by any expert --

18 **MR. SNYDER:** Yes, in January 2011 --

19 **MAGISTRATE JUDGE FOSCHIO:** -- and --

20 **MR. SNYDER:** -- the document was sent by the
21 plaintiff to two of his experts.

22 **MAGISTRATE JUDGE FOSCHIO:** Why?

23 **MR. SNYDER:** For them to examine it.

24 **MAGISTRATE JUDGE FOSCHIO:** Why?

25 **MR. SNYDER:** I don't -- I was not privy to those

1 conversations.

2 **MAGISTRATE JUDGE FOSCHIO:** How do you know that he
3 did that?

4 **MR. SNYDER:** Because both experts have sworn to the
5 Court that that is so.

6 Mr. Aginsky --

7 **MAGISTRATE JUDGE FOSCHIO:** Do we have that in
8 previous filings?

9 **MR. SNYDER:** Yes, number 66, Mr. Aginsky describes
10 the ink that he -- that on the first page is black ballpoint
11 ink and we know that based on his testimony to this Court.
12 That image of a black ballpoint ink on page 1 was taken in
13 January of 2011. Dark ink paper that did not appear to be
14 discolored, we have those images.

15 That's what we fought so hard to get, and Mr. Lake
16 and Mr. Ceglia fought us that they didn't want to give us.
17 They didn't want to give it to us, Your Honor, because they
18 knew that the document, which they also didn't want to give us
19 the original copy of to examine, had been tampered with.

20 The reason they fought so hard against those
21 images, the experts' images that Your Honor ordered must be
22 produced to us, is because they knew that those images would
23 be images taken in January 2011 of a pristine document with
24 dark ballpoint ink.

25 **MAGISTRATE JUDGE FOSCHIO:** And they knew it had

1 been cooked --

2 **MR. SNYDER:** And they knew that the document --

3 **MAGISTRATE JUDGE FOSCHIO:** -- or baked?

4 **MR. SNYDER:** -- that they would have to produce to
5 us in -- the original document had already been cooked.

6 And why had it been cooked? Because the ink, the
7 ballpoint ink on page 1 was too wet. So they tried -- they
8 discolored -- they baked it, whether they put it out in the
9 sun or -- our experts will address that when we move to
10 dismiss.

11 They attempted to age the ink. That was spoliation
12 because they attempted to reduce the probative value,
13 eliminate the probative value of the ink that their experts
14 have sworn to this Court was bold and dark and distinct in
15 January 2011 before we saw hide or hair of the document.

16 So, but what happened Your Honor --

17 **MAGISTRATE JUDGE FOSCHIO:** Did it -- did it -- did
18 Aginsky explain why he felt it necessary to take a photograph
19 of the document?

20 **MR. SNYDER:** That's standard operating procedure
21 for experts, Your Honor.

22 **MAGISTRATE JUDGE FOSCHIO:** Sorry I asked.

23 **MR. SNYDER:** A document expert, what they love to
24 do with their cameras and --

25 **MAGISTRATE JUDGE FOSCHIO:** Shame on me.

1 **MR. SNYDER:** It is standard operating procedure.
2 When an expert receives original evidence, they take an image
3 of it.

4 **MAGISTRATE JUDGE FOSCHIO:** Did Mr. Aginsky in any
5 way disclose why the plaintiff sought out his assistance in
6 this way at that time?

7 **MR. SNYDER:** No, Your Honor, but we know for a fact
8 that he had it and a man named -- what's Osborn's first name?

9 **MS. AYCOCK:** John Paul.

10 **MR. SNYDER:** John Paul Osborn, a second expert,
11 also got the original document in January of 2011 and took a
12 picture or scan of it.

13 The reason the plaintiff fought so hard in this
14 court, in the old courthouse to hide those original scans from
15 us is they knew that when we compared the original scans to
16 the original -- to the document as it existed in the summer of
17 2011, that they also didn't want to give us for inspection,
18 they knew there would be a glaring, glaring discrepancy.

19 And the reason there is a glaring discrepancy is
20 because the plaintiff and people acting in concert with him
21 and/or, I don't know at this time, subjected the original
22 document to a tampering process for the purpose of -- of -- of
23 taking the ink out of the handwritten portion of the document
24 so it couldn't be date tested.

25 However, Your Honor, we will tell -- we will

1 disclose to this Court when we move to dismiss, as I told Your
2 Honor last time, at an appropriate time when he is in
3 compliance of the orders, that they didn't do a good enough
4 job tampering with the document.

5 **MAGISTRATE JUDGE FOSCHIO:** Why is that?

6 **MR. SNYDER:** Because there was sufficient ink left
7 on the faded ink on page 1, which is substantially faded, but
8 there was sufficient ink left, they didn't cook it enough,
9 they didn't try it out enough to determine authoritatively,
10 which we will provide the Court the evidence of when we move
11 to dismiss when he is in compliance pursuant to this Court's
12 procedures, shows that those handwritten interlineations on
13 page 1 of the fraudulent contract are less than two years old.

14 The ink is fewer than two years old, meaning to say
15 it is physically impossible based on forensic, irrefutable,
16 scientific evidence that we will present to the Court when we
17 move to dismiss, that Mark Zuckerberg signed the version of
18 the contract that's attached --

19 **MAGISTRATE JUDGE FOSCHIO:** That's the first time --
20 that's the first time you've divulged to us the results of
21 your experts testing.

22 **MR. SNYDER:** I said that last time actually.

23 **MAGISTRATE JUDGE FOSCHIO:** Did you?

24 **MR. SNYDER:** Yes, Your Honor.

25 **MAGISTRATE JUDGE FOSCHIO:** Okay, I missed it. I'm

1 sorry, I missed it --

2 **MR. SNYDER:** So what happens then is between
3 January 2011 and July 14th, 2011 --

4 **MAGISTRATE JUDGE FOSCHIO:** Can I get a word
5 edgewise here for a second?

6 **MR. SNYDER:** Yes.

7 **MAGISTRATE JUDGE FOSCHIO:** When -- when your
8 experts -- who was that that first exposed -- when you first
9 saw the document --

10 **MR. SNYDER:** Let me get to that, Your Honor.

11 **MAGISTRATE JUDGE FOSCHIO:** You must have been
12 shocked --

13 **MR. SNYDER:** Let me explain what happened between
14 January 2011 and July 14th, 2011, the work-for-hire document
15 was in the sole possession of plaintiff and Mr. Argentieri and
16 we have the records to show that it was taken in and out of
17 the safe deposit box at various times between January 2011 and
18 July 14th, 2011.

19 Now, I'm going to -- I'm going to go slowly. At
20 9:11 a.m. on July 14th in Mr. Flynn's office at Harris Beach,
21 just blocks from here, Mr. Argentieri entered the room,
22 removed the document from a U.S. Postal Service envelope, he
23 placed the document on the table in the presence of Mr.
24 Southwell, Mr. Flynn --

25 **MAGISTRATE JUDGE FOSCHIO:** Use the microphone.

1 **MR. SNYDER:** Who else was there? (Inaudible.

2 **MAGISTRATE JUDGE FOSCHIO:** We need you to use the
3 microphone.

4 **MR. SNYDER:** Mr. Flynn's colleague, Mr. Southwell,
5 Mr. Benjamin and Ms. Aycock. And in the presence of our
6 experts.

7 At that moment before we subjected to any testing,
8 it was immediately apparent and then forever preserved in high
9 resolution scans at that moment made by our experts, which we
10 will submit when we move to dismiss, before our experts
11 subjected it to any testing, to any light treatment that the
12 document looked nothing like it had looked when it was sent to
13 his experts in January of 2011.

14 The ink was faded. The paper was discolored.
15 These scans are conclusive. It's not a battle of experts.
16 Plaintiff is -- cannot explain the obvious difference in the
17 quality of the ink between January of 2011 and July 14th,
18 2011.

19 I can show them to Your Honor. They are shocking.
20 So shocking that moments later they called me on the phone and
21 said, "You are not going to believe this," and our experts
22 said, and we'll say to Your Honor in sworn statements, and
23 these are -- these are men who were hired by the United States
24 Secret Service, the United States Government, the United
25 States Justice Department for the most important cases, they

1 had never seen a document that had been tampered with like
2 this.

3 These scans and the alarming transformation that
4 the document underwent in the hands of the plaintiff and
5 Mr. Argentieri are corroborated by firsthand witness
6 testimony --

7 **MAGISTRATE JUDGE FOSCHIO:** But you just heard from
8 Mr. Boland that -- that as a result of your discoloration of
9 the document that he's behind the eight ball relative to
10 persuading the jury as to its authenticity.

11 Why -- why in the heavens name would a plaintiff
12 inflict such a self-inflicted wound?

13 **MR. SNYDER:** Well, not all criminals are smart.

14 **MAGISTRATE JUDGE FOSCHIO:** I mean, if it's --

15 **MR. SNYDER:** Not all criminals are smart. And the
16 cover up, we've learned, oftentimes is more blundering, more
17 self-defeating, and ultimately more damning than the crime
18 itself.

19 The crime here is the litigation fraud being
20 perpetrated on this Court. The cover up is the destruction of
21 the USB devices and other misconduct in discovery, and the
22 attempt -- and you know why they did it? Because I said in
23 open court we're going to have experts test the ink and that
24 was a big, big problem for them.

25 Because the ink is wet, because the document was

1 forged within the past two years. They had to do something
2 with that original ink.

3 When we didn't pay them the quick settlement that
4 they wanted --

5 **MAGISTRATE JUDGE FOSCHIO:** When did -- when did you
6 tell them -- when --

7 **MR. SNYDER:** In open court -- in open court when we
8 first moved for expedited discovery.

9 **MAGISTRATE JUDGE FOSCHIO:** But that was after the
10 cooking process --

11 **MR. SNYDER:** No.

12 **MAGISTRATE JUDGE FOSCHIO:** -- by your theory.

13 **MR. SNYDER:** No, before.

14 **MAGISTRATE JUDGE FOSCHIO:** Before?

15 **MR. SNYDER:** Absolutely.

16 **MAGISTRATE JUDGE FOSCHIO:** Because the in and out
17 from the safe deposit box occurred after the motion was made
18 for expedited discovery?

19 **MR. SNYDER:** Your Honor, I don't know when they
20 baked the document.

21 **MAGISTRATE JUDGE FOSCHIO:** Well, you know when it
22 came in and out of the safe deposit box.

23 **MR. SNYDER:** Here's what I know. Here's what I
24 know. They filed the case and demanded a settlement. They
25 then went to the press and thought that we would pay them --

1 we would pay them off for this shakedown.

2 When that didn't happen, I asked counsel
3 repeatedly, "Show me the original document." If it's -- prior
4 counsel, Mr. -- Collins, is that his name? Connors. Mr.
5 Connors, Mr. -- every one of the seven prior lawyers I would
6 say, "if you have a real document, show it to me."

7 No one wanted to show me the original document. No
8 one wanted to show me the original document. And because
9 guess what? Page 1 had dark bold ink that didn't -- that --
10 that -- that created -- that posed a problem.

11 When they decided to discolor it, I don't know.
12 Maybe we'll never know. We know it was between -- we know for
13 a fact -- beyond any question, beyond a shadow of a doubt that
14 it was between January of 2011 and prior to our experts
15 getting their hands on it and we will present that evidence to
16 the Court at an appropriate time.

17 **MAGISTRATE JUDGE FOSCHIO:** But prior to
18 January 2011, you had demanded a -- to observe the original?

19 **MR. SNYDER:** From day one I said to Mr. Connors
20 when I came into this case, "you know what? If you have a
21 real document, which you don't because this case is a fraud,
22 show it to me. I don't believe it."

23 And then when we finally asked this Court to direct
24 them to turn it over, they didn't even want to show it to us.

25 And when they finally had to show it to us, what

1 they showed us was --

2 **MAGISTRATE JUDGE FOSCHIO:** Did you tell Mr. Connors
3 at that time that you intended to subject it to an ink test?

4 **MR. SNYDER:** I don't recall, Your Honor. I don't
5 recall. But it would have been obvious to a forger that if
6 they had to cough up the original and it was a amateur-ish
7 forgery, which it was, according to our experts, this is an
8 amateur-ish forgery. This isn't a sophisticated forgery.
9 This isn't like a \$20 bill that -- that, you know,
10 organized --

11 **MAGISTRATE JUDGE FOSCHIO:** We assume Mr. Connors
12 relayed that information to his client.

13 **MR. SNYDER:** Well, Mr. Connors withdrew from the
14 case, Your Honor. I don't know.

15 **MAGISTRATE JUDGE FOSCHIO:** Well, I know that, but
16 before he withdrew we assume that he would have alerted Mr. --
17 Mr. Ceglia that you intended to conduct an ink test?

18 **MR. SNYDER:** Well, I don't recall if I told Mr.
19 Connors I was conducting an ink test, but he knew that -- he
20 knew as former federal prosecutors that we were going to
21 subject the original document to every forensic analysis
22 available. And we did.

23 And Mr. Tytell, at document 238, swears to this
24 Court and you can look at his credentials, this is a man
25 who --

1 **MAGISTRATE JUDGE FOSCHIO:** I've looked at them.

2 **MR. SNYDER:** -- the ink that I saw on the
3 work-for-hire document on the morning of July 14th was neither
4 black nor of normal density.

5 **MAGISTRATE JUDGE FOSCHIO:** And it was -- it was --

6 **MR. SNYDER:** On the morning of July 14th it was
7 neither black nor of normal density. I observed that the ink
8 on both pages was light, tan or faded brown. Not at all the
9 sort of appearance that I would expect for black ballpoint ink
10 after eight years of normal storage.

11 Gus Lesnevich and Mr. LaPorte, in documents 239 and
12 240 --

13 **MAGISTRATE JUDGE FOSCHIO:** Okay, yeah, it -- I know
14 what he said --

15 **MR. SNYDER:** Okay. Now, nobody present in the
16 Harris Beach offices --

17 **MAGISTRATE JUDGE FOSCHIO:** He said it was brittle
18 too, didn't he?

19 **MR. SNYDER:** Yes.

20 **MAGISTRATE JUDGE FOSCHIO:** Yes.

21 **MR. SNYDER:** Now, no one has submitted an affidavit
22 that contradicts this damning evidence, evidence that confirms
23 that Ceglia and those working with him tampered with this
24 evidence.

25 Now, Your Honor, to the issue here is not whether

1 the document was spoliated.

2 **MAGISTRATE JUDGE FOSCHIO:** Yeah.

3 **MR. SNYDER:** The question is when and by whom.

4 **MAGISTRATE JUDGE FOSCHIO:** Yeah.

5 **MR. SNYDER:** And -- and -- and the ultraviolet
6 testing, which our experts will address the amount of time it
7 was exposed and each kind of testing when we issue our reports
8 and move to dismiss, but it's irrelevant because the document,
9 the ink was already faded when it came out of Mr. Argentieri's
10 envelope.

11 Now, Mr. -- Mr. Boland --

12 **MAGISTRATE JUDGE FOSCHIO:** Excuse me. Did Mr.
13 Tytell or any of your other experts indicate either directly
14 or indirectly how they thought the document had come to be
15 discolored?

16 **MR. SNYDER:** We're going to address that in our --
17 in our motions, but they have various -- there are -- there
18 are -- there are various theories which they think --

19 **MAGISTRATE JUDGE FOSCHIO:** Did they express them at
20 that time?

21 **MR. SNYDER:** To me and to counsel, certainly.

22 **MAGISTRATE JUDGE FOSCHIO:** They did?

23 **MR. SNYDER:** I was on the phone -- I was on the
24 phone within -- within minutes, ten minutes in New York.

25 "You're never gonna believe what happened?"

1 "What?"

2 "They cooked the document."

3 "Were they that dumb?"

4 "Yes, they were that dumb."

5 Now we know why they fought the scans and now we
6 know why they fought the document the way they fought the
7 document. It wasn't normal. It wasn't explicable why they
8 would have fought so hard to produce scans that they gave to
9 their experts in January if this is their billion dollar
10 document. Show every copy to the world that exists, pile them
11 up, like on a miracle on 34th Street.

12 They come to the Court and they pile examples.
13 Every image of the contract they should pile up and show to
14 the world, but they didn't want the world to see those
15 January scans because that was before they baked the ink.

16 Now, what does Mr. Boland say in response? Now,
17 it's very telling what he says in response. What he says is
18 look -- first he pretends the fact that Mr. Southwell, Mr.
19 Benjamin, Ms. Aycock and Mr. Nonkes didn't submit declarations
20 saying that they were shocked and surprised that the
21 discoloration is somehow telling, even though all our experts
22 said obviously that's absurd. All submit sworn statements to
23 that effect.

24 Next, faced with the irrefutable photographic
25 evidence, he's reduced to relying on a video, which he

1 mischaracterizes. And we'll present this all to the Court
2 when we move to dismiss.

3 **MAGISTRATE JUDGE FOSCHIO:** You don't have a copy of
4 that high resolution picture that Mr. --

5 **MR. SNYDER:** Yes.

6 **MAGISTRATE JUDGE FOSCHIO:** -- that Mr. Aginsky
7 took --

8 **MR. SNYDER:** Yes.

9 **MAGISTRATE JUDGE FOSCHIO:** And -- and --

10 **MR. SNYDER:** I will hand it to the Court --

11 **MAGISTRATE JUDGE FOSCHIO:** -- and did your -- did
12 Mr. Tytell took a photograph, a similar photograph of the
13 instrument as it came out of Argentieri's possession?

14 **MR. SNYDER:** Yes. If I could -- I have a scan of
15 page 1 by Aginsky on January 13th, 2011, and then a scan by
16 Peter Tytell on July 14th, 2011, at 9:18 a.m., minutes after
17 Mr. Argentieri removed it from his envelope and before the
18 defendants --

19 **MAGISTRATE JUDGE FOSCHIO:** So what do you have in
20 your hand there that I can look at? What exactly is this,
21 please, again?

22 **MR. SNYDER:** Those are as I just described --

23 **MR. BOLAND:** Your Honor, for the record, if he
24 could just identify what exhibit that is that was attached to
25 what motion?

1 **MR. SNYDER:** Yes, I will.

2 **MR. BOLAND:** That would be helpful.

3 **MR. SNYDER:** I will, I will. The faded one, the
4 one that was taken by Mr. Tytell on July 14th, 2011, is
5 document 238-2.

6 And -- and we have not yet filed the Aginsky
7 document because this is all --

8 **MAGISTRATE JUDGE FOSCHIO:** And this document is
9 authenticated by Mr. Aginsky's earlier affidavit to the Court?

10 **MR. SNYDER:** Yes, Your Honor.

11 **MAGISTRATE JUDGE FOSCHIO:** Yeah.

12 **MR. SNYDER:** I'm showing it to Mr. Boland.

13 **MAGISTRATE JUDGE FOSCHIO:** Well, you know,
14 Mr. Boland, just to take a break here, might not be a bad
15 idea, but if you have the two instruments, do you have them?
16 Do you want to look at them?

17 **MR. BOLAND:** I have them, Your Honor.

18 **MAGISTRATE JUDGE FOSCHIO:** There does seem -- I
19 mean, you can perceive it's -- it's -- it's perceivable that
20 there's a shading of the July 14th image --

21 **MR. BOLAND:** Oh, absolutely, Your Honor.

22 **MAGISTRATE JUDGE FOSCHIO:** -- by comparison to the
23 January 13th.

24 **MR. BOLAND:** What's missing is the problem.

25 **MAGISTRATE JUDGE FOSCHIO:** Oh.

1 **MR. BOLAND:** You don't know what devices, what
2 settings, software, manipulations. I mean, you're comparing
3 what software, what settings. You're comparing apples to
4 truck tires. They're not -- you can't even compare the two
5 documents.

6 **MAGISTRATE JUDGE FOSCHIO:** Or bowling pins.

7 **MR. BOLAND:** Or bowling pins.

8 **MAGISTRATE JUDGE FOSCHIO:** That's his simile.

9 **MR. BOLAND:** Mm-hmm.

10 **MR. SNYDER:** And now we know why Mr. Boland tricked
11 Mr. Gianadda, I understand Your Honor has already ruled on
12 that, to suggesting that the colors changed when he said no
13 such thing.

14 And so -- and as a last resort, Mr. Boland is
15 reduced to relying on Mr. Argentieri's sworn statements,
16 Mr. Argentieri, again, notably not here, not coincidental, I
17 don't think, that he observed the work-for-hire "as two pieces
18 of white paper."

19 Now, Mr. Argentieri's declaration, document 193, is
20 telling and significant for what it omits. He says nothing
21 about the ink. Of course, the paper is white, as opposed to
22 blue, green, yellow or orange.

23 Mr. Argentieri, even when he files a reply
24 affidavit, says nothing under oath about the Tytell scans.

25 **MAGISTRATE JUDGE FOSCHIO:** Right.

1 **MR. SNYDER:** Or the color of the ink. And once
2 confronted with the Tytell scans, tellingly, plaintiff's
3 experts Jim Blanco and Larry Stewart are apparently no longer
4 comfortable speculating about the appearance of the document
5 based on a video because the video --

6 **MAGISTRATE JUDGE FOSCHIO:** Yeah, I understand about
7 the video.

8 **MR. SNYDER:** -- says nothing, tells us nothing.

9 **MAGISTRATE JUDGE FOSCHIO:** Okay.

10 **MR. SNYDER:** You can't make out on the video the
11 appearance of the ink, whether it's bold or faded.

12 **MAGISTRATE JUDGE FOSCHIO:** Okay.

13 **MR. SNYDER:** It tells us zero about the ink.

14 **MAGISTRATE JUDGE FOSCHIO:** I would like to get
15 Mr. Boland on his feet here --

16 **MR. SNYDER:** Yeah.

17 **MAGISTRATE JUDGE FOSCHIO:** -- but before we do, we
18 might want to take a stretch break of some sort. But before
19 we do that, you're familiar with his arguments about comparing
20 apples to bowling pins and so forth based on the potential for
21 software settings and the like that would account for the
22 appearance that there's a substantial different -- difference
23 in coloration or -- or appearance generally in the two
24 documents January vs. July.

25 **MR. SNYDER:** I don't understand it, Your Honor,

1 because --

2 **MAGISTRATE JUDGE FOSCHIO:** You don't understand it?

3 **MR. SNYDER:** No, because every time we find
4 evidence that this plaintiff has committed a fraud on this
5 Court --

6 **MAGISTRATE JUDGE FOSCHIO:** Okay.

7 **MR. SNYDER:** -- he has an explanation, we find the
8 contract, the authentic *bona fida* contract and he says we
9 planted it.

10 **MAGISTRATE JUDGE FOSCHIO:** No, no, you said -- for
11 purposes of taking a break --

12 **MR. SNYDER:** Yeah.

13 **MAGISTRATE JUDGE FOSCHIO:** -- I just needed to know
14 that you don't understand it. We're going to take like a ten
15 minute comfort break.

16 **MR. SNYDER:** Sure.

17 **MAGISTRATE JUDGE FOSCHIO:** We've got wonderful
18 rooms, conference rooms, facilities, right, Sandra? For
19 anybody who wants to use them or outside here also somewhere.

20 **MR. BOLAND:** To the right, Your Honor.

21 **MAGISTRATE JUDGE FOSCHIO:** Lavatory facilities and
22 the like. And we'll take a ten minute comfort break.

23 I just want to break it up --

24 **MR. SNYDER:** Yeah.

25 **MAGISTRATE JUDGE FOSCHIO:** -- to move forward so we

1 can get to the Harvard e-mails and the other issues in the
2 case, but I -- because you don't understand what I thought I
3 understood, apparently maybe I misunderstood, the rationale
4 for why it's conceivable that there is the appearance of a
5 difference between the two documents.

6 And we'll let Mr. Boland explain that to you.

7 **MR. SNYDER:** Before we break can I just say one
8 thing, Your Honor?

9 **MAGISTRATE JUDGE FOSCHIO:** Sure.

10 **MR. SNYDER:** We will -- we will on our motion to
11 dismiss, I'm confident, as I predicted before, I told Your
12 Honor I was confident we would test the ink and that we would
13 find that it was new. We did.

14 I told Your Honor that I had some degree of
15 confidence, hopefully, we find the authentic original
16 contract. And we did.

17 I have a high degree of confidence that we are --

18 **MAGISTRATE JUDGE FOSCHIO:** Well, not according to
19 the plaintiff.

20 **MR. SNYDER:** Right. Well, right --

21 **MAGISTRATE JUDGE FOSCHIO:** Somebody -- somebody
22 created that instrument.

23 **MR. SNYDER:** Right, right. We'll get to that
24 fantastical, that's not evidence, that's just -- that's just
25 craziness, but I'll get to that in a moment.

1 Evidence is -- is different than -- than -- than
2 fantastical imagination, but let me just say this --

3 **MAGISTRATE JUDGE FOSCHIO:** But it is a piece of
4 paper --

5 **MR. SNYDER:** What's that?

6 **MAGISTRATE JUDGE FOSCHIO:** -- somebody created it.
7 It is a piece of paper.

8 **MR. SNYDER:** Yeah, we'll get to that in a moment,
9 Your Honor, but my point on this -- this question of -- of the
10 tampering of the document by the plaintiff, the plaintiff is
11 asking this Court to prohibit defendants from presenting that
12 evidence to the Court is just another effort to vacate the
13 expedited discovery order by gutting the primary purpose,
14 which is a search for the truth and a presentation of that
15 evidence to this Court at an appropriate time.

16 And what makes that request to gut the expedited
17 discovery order by precluding us from presenting the very
18 evidence that it was designed to uncover, what makes that
19 request even more audacious is that the plaintiff for six
20 months has been obstructing our effort to get to this
21 evidence, including the critical evidence now that he wants us
22 to be prohibited from presenting to the Court.

23 Every piece of evidence that we found he fought us
24 tooth and nails trying to prevent us from getting. And then
25 when we get it and it proves his fraud is deeper and broader

1 than -- than even we presented to the Court at the outset, he
2 asked this Court to prevent us, prohibit us from even
3 presenting it to the Court.

4 So we think it should -- the motion -- this motion
5 and the other unripe motions are -- are without any merit, but
6 should be denied, motions are without any merit.

7 And really to debate the merits of them is
8 premature.

9 **MAGISTRATE JUDGE FOSCHIO:** Well, I just want to
10 make sure you have an opportunity to be heard on it, which you
11 will. Mr. Boland's going to, after the break, explain why
12 there's a perfectly understandable technical reason for the --
13 what you think is evidence of cooking.

14 And we'll pick up in about ten minutes. Let's take
15 a break.

16 **THE CLERK:** All rise.

17 (WHEREUPON, there was a pause in the proceeding.)

18 **THE CLERK:** All rise. Please be seated.

19 Back on the record, Ceglia vs. Zuckerberg and
20 Facebook, continuation of oral argument.

21 **MAGISTRATE JUDGE FOSCHIO:** Now, addressing
22 plaintiff's motion to prohibit the defendant from -- actually,
23 we're -- is it -- it's sanctioning of the defendant for
24 spoliation, Mr. --

25 **MR. BOLAND:** Yes, Your Honor, and at the end of the

1 motions, the variety of sanctions --

2 **MAGISTRATE JUDGE FOSCHIO:** And prohibiting?

3 **MR. BOLAND:** Yes.

4 **MR. SNYDER:** You're actually -- the plaintiff is
5 actually seeking a default judgment or other sanctions
6 against defendants. The plaintiff is actually seeking a
7 default judgment or other sanctions (inaudible) --

8 **MAGISTRATE JUDGE FOSCHIO:** That's right, the first
9 proposed -- the request is prohibiting defendants from
10 disputing the authenticity, which is tantamount to a default.

11 And then directing the jury to presume that it was
12 likely that usable fingerprints, that would be the sanction
13 for spoliation.

14 Prohibiting Facebook from mentioning to the jury
15 regarding the fingerprints, yeah.

16 So, yes, it's a spoliation claim related to the
17 underlying document as a result of improper testing and
18 handling.

19 And we would like -- two questions. First, either
20 one of you can answer this, whether or not the January 13th,
21 2011 high resolution photograph taken by Mr. Aginsky, I
22 believe, was of both sides of the page or just the side with
23 text?

24 **MR. BOLAND:** The images I have, Your Honor, from
25 him are just the front of each page.

1 **MAGISTRATE JUDGE FOSCHIO:** Just the front.

2 **MR. BOLAND:** I'm not aware of him capturing the
3 back of each page, it may have happened, but I don't have
4 those as an exhibit.

5 **MAGISTRATE JUDGE FOSCHIO:** Both pages, 1 and 2?

6 **MR. BOLAND:** Correct, the front of each page is all
7 I have, to my recollection.

8 **MAGISTRATE JUDGE FOSCHIO:** So --

9 **MR. SNYDER:** Your Honor, there were two experts.
10 We just gave you one. It's the same basic image, but they
11 also have an expert, Osborn --

12 **MAGISTRATE JUDGE FOSCHIO:** Yes.

13 **MR. SNYDER:** -- who scanned it, the original
14 document, and it looks the same as Aginsky.

15 **MAGISTRATE JUDGE FOSCHIO:** Just the front page?

16 **MR. SNYDER:** Yes, Your Honor.

17 **MAGISTRATE JUDGE FOSCHIO:** Thank you. Okay. So
18 you were going to explain to Mr. -- Mr. Boland, so that
19 Mr. Snyder could understand, although I thought I understood,
20 why there could be a dissimilarity in appearance, which has
21 nothing to do with their contention that the document was
22 treated by some improper process applied by the plaintiff
23 during the six-month period before the testing in July.

24 **MR. SNYDER:** Your Honor, to save time, I understand
25 his argument.

1 **MAGISTRATE JUDGE FOSCHIO:** Oh.

2 **MR. SNYDER:** And I understand the words. It's just
3 nonsense -- it makes no sense and it's -- and it's wrong.

4 So I understand what his argument was.

5 **MAGISTRATE JUDGE FOSCHIO:** Oh, okay.

6 **MR. SNYDER:** But what -- and -- and -- and what I
7 meant by saying "I don't understand it" is I can't
8 comprehend -- I can't comprehend its logic for reasons that
9 I'm happy to explain now or -- or at a -- at a future time.

10 **MAGISTRATE JUDGE FOSCHIO:** Let's just let him
11 reiterate what it is --

12 **MR. BOLAND:** I can demonstrate it instead of
13 talking.

14 **MAGISTRATE JUDGE FOSCHIO:** -- tee it up so we can
15 get going and move on.

16 **MR. BOLAND:** Very well. Can you have my iPad show
17 up on the screen? It's just one of the exhibits from the
18 case, Your Honor.

19 **MAGISTRATE JUDGE FOSCHIO:** Well, that's what we
20 have all this technology for.

21 **MR. BOLAND:** Of course.

22 **MR. SNYDER:** Perhaps Mr. Boland can tell defense
23 counsel what he's doing or looking at.

24 **MR. BOLAND:** Exhibit 238-2 that your expert Tytell
25 submitted, his scan taken July 14th, some -- at some point in

1 his testing.

2 And the example here, Your Honor, is scanning
3 devices and the software that operates them have a variety of
4 settings. So I'm just going to give you an example. If I
5 zoom in on this ink from Mr. Tytell's scan, it has a degree of
6 fading and then some dark ink off to the side.

7 But if you -- I captured this screen while we were
8 waiting -- or while we had our break, and I just put it into
9 this application Photo Shop, and I'll give you an example of
10 just one setting that you could change on a scanner or on
11 software.

12 Watch what happens to the ink when I change the
13 exposure of this document. It fades out, meaning if one
14 expert had his exposure setting at one level and the other
15 expert had it at another level, the ink will look more or less
16 faded.

17 There's also things called "filters" that photo
18 editing software can put on there. And here's an example.
19 Look what happens to the ink when it goes black and white: It
20 nearly disappears. And then when you go to this filter, the
21 ink is back again.

22 And then when you go to this filter in the corner,
23 the ink is faded again. And this is just a few tools on a
24 watered down version of Photo Shop.

25 The point being --

1 **MAGISTRATE JUDGE FOSCHIO:** We don't know what --

2 **MR. BOLAND:** -- the scanning devices, you have to
3 have the same settings, the same devices and we have to have
4 proof that we have the native file format of those scans and
5 then compare them. And if there's a difference, now they
6 might have an argument.

7 But what they're doing here is not comparable.

8 **MAGISTRATE JUDGE FOSCHIO:** Speculative, you think?

9 **MR. BOLAND:** Absolutely speculative. And I'll
10 respond to his argument with even more proof that it's not
11 accurate.

12 **MAGISTRAT JUDGE FOSCHIO:** And -- and the fact
13 that -- the fact that the background, which is the paper
14 media, is highlighted on this copy that I'm holding in my hand
15 revealing a margin that is white because that's the --

16 **MR. BOLAND:** I see that, Your Honor.

17 **MAGISTRATE JUDGE FOSCHIO:** -- the paper vs. the
18 document which is shaded, the shading is also a potential
19 result of different software settings and lighting and so
20 forth?

21 **MR. BOLAND:** Absolutely. Because any of these
22 filters, as you're seeing on the screen now, you can actually
23 change the apparent color of the background of the document.

24 So -- well, actually, it's disappearing there. For
25 example now, this one has put in all kinds of colors on the

1 document, and you can pick red or blue or a light white color
2 and color it any way you want.

3 I'm not trying to imply any expert had some
4 nefarious plan. It's just merely how they are comfortable
5 setting up their machines can result in a certain type of --

6 **MAGISTRATE JUDGE FOSCHIO:** Aginsky had one machine
7 with one setting --

8 **MR. BOLAND:** Correct.

9 **MAGISTRATE JUDGE FOSCHIO:** -- arguably Tytell had
10 another machine with a different setting?

11 **MR. BOLAND:** Right. And the defendants didn't
12 bother to ask the expert for any of that material, and we
13 don't know what their experts' information was.

14 The defendants didn't bother to ask Mr. Aginsky
15 what all those features were, software and settings.

16 **MAGISTRATE JUDGE FOSCHIO:** Mm-hmm.

17 **MR. BOLAND:** And we don't know what Mr. Tytell's
18 software, scanning device and settings were either. So you
19 can't compare.

20 **MAGISTRATE JUDGE FOSCHIO:** Why is that?

21 **MR. BOLAND:** They haven't provided that to us.

22 **MAGISTRATE JUDGE FOSCHIO:** Have you asked for it?

23 **MR. BOLAND:** Well, they're not -- we're not
24 entitled to until the Court says that Mr. Ceglia's completed
25 his side of the discovery. We don't get their expert reports.

1 If I'm entitled to ask, I'll ask tomorrow.

2 **MAGISTRATE JUDGE FOSCHIO:** Well, I'm just saying,
3 I'm trying to decide whether there's a basis for your
4 assertion that there was some spoliation by the defendant.

5 You have the burden, don't you?

6 **MR. BOLAND:** Yes, Your Honor. I wasn't aware I was
7 entitled to sort of this targeted discovery type questions. I
8 will certainly ask them all those details. I'd love to know.

9 **MAGISTRATE JUDGE FOSCHIO:** Well, I don't know. It
10 just strikes me that if there's a rational explanation for
11 this variance, that somebody should have pounced on it and --
12 before making these assertions that spoliation, which is a
13 serious accusation, has occurred.

14 **MR. BOLAND:** You're right, Your Honor. They're the
15 ones actually making the ink based spoliation that we're
16 talking about now. So they've raised this issue.

17 We're not -- we haven't raised the ink has faded
18 issue. They're claiming that it was faded when they got it.
19 So it's really their burden, they've raised that, not us.

20 **MAGISTRATE JUDGE FOSCHIO:** Yes, but you -- you are
21 asserting that they spoliated your -- the document after -- as
22 a result of testing.

23 **MR. BOLAND:** Yes, by yellowing the document.

24 **MAGISTRATE JUDGE FOSCHIO:** By yellowing the
25 document?

1 **MR. BOLAND:** Yes.

2 **MAGISTRATE JUDGE FOSCHIO:** Which -- which
3 presupposes that the document was not already yellowed.

4 **MR. BOLAND:** Correct.

5 **MAGISTRATE JUDGE FOSCHIO:** That premise could only
6 be established, if at all, by showing that there was a
7 variation between the image that Tytell took in January -- in
8 July vs. the image that Aginsky took in -- in January.

9 You -- you are telling me that if -- if the
10 settings are different, you -- you just agreed that if the
11 settings were the same and the machine that was used was the
12 same, then they would have an argument.

13 **MR. BOLAND:** That something happened to the
14 document.

15 **MAGISTRATE JUDGE FOSCHIO:** Which means that you
16 wouldn't have an argument that spoliation occurred.

17 **MR. BOLAND:** We would, Your Honor. We still would
18 actually.

19 **MAGISTRATE JUDGE FOSCHIO:** Okay. I guess I want
20 you to tell me what that is. I missed it probably or read it
21 and it just doesn't click in my mind now.

22 **MR. BOLAND:** I can actually show --

23 **MAGISTRATE JUDGE FOSCHIO:** Do you get my drift
24 here? That -- that if you have the burden and it's -- and
25 that burden can only be established by showing that what

1 appears to be a difference as of July is actually fictitious
2 or factitious because it could be that it's accounted for by
3 these variations --

4 **MR. BOLAND:** Yes.

5 **MAGISTRATE JUDGE FOSCHIO:** -- and you haven't made
6 an effort to prove that there were variations, you lose
7 because you didn't meet your burden. Your major premise is
8 not established.

9 **MR. BOLAND:** Your Honor, our premise is -- if you
10 look at the exhibits that's up on the screen, this is our
11 263-2, that's our premise right there.

12 On the left you see their experts' image of the
13 Ceglia/Zuckerberg contract taken the first day of testing.
14 And on the right you see their experts' image of the same
15 document taken 24 hours later.

16 **MAGISTRATE JUDGE FOSCHIO:** Maybe that's an
17 equipment and a change of software settings as well.

18 **MR. BOLAND:** Right. And if it is, the defendants
19 would have to say, "Your Honor, Mr. Boland's wrong. Our
20 experts just screwed up and had all kinds of different
21 settings. That accounts for the yellow."

22 However, our own experts --

23 **MAGISTRATE JUDGE FOSCHIO:** You have the burden.

24 **MR. BOLAND:** I understand that. Our own experts
25 have imaged the document and that's exactly what it looks

1 like. The yellow you see there is what our experts have
2 submitted as the condition.

3 **MAGISTRATE JUDGE FOSCHIO:** Lesnevich is your
4 expert?

5 **MR. BOLAND:** No, Lesnevich is theirs, but our
6 experts have also taken images of the document and submitted
7 them, connected with declarations. The document looks
8 yellowed just like you see in their experts' image.

9 And this happened in a 24-hour period while it was
10 in their possession.

11 **MAGISTRATE JUDGE FOSCHIO:** And -- and -- and did
12 your experts know what the machine and the settings were for,
13 the Tytell comparative?

14 **MR. BOLAND:** We have no idea what Tytell's scans
15 and what Lesnevich's scans were. We just know that --

16 **MAGISTRATE JUDGE FOSCHIO:** Well, there -- well,
17 that's my point.

18 **MR. BOLAND:** Okay. They're asserting that's the
19 condition of the document, and we know it's now yellow. So
20 unless they're going to say Tytell made a mistake and that's
21 not really the condition of the document, then we -- we've met
22 our burden.

23 **MAGISTRATE JUDGE FOSCHIO:** Well, what about the
24 Lesnevich image? Couldn't that be the result of a change?
25 Couldn't that be the result of a change in machine and

1 settings as well?

2 **MR. BOLAND:** It well could be, but it's backed up
3 by our experts who also took scans. I don't know what their
4 settings were, but they got the same image. Everyone's
5 getting the same image after 24 hours.

6 That explains it, Your Honor. Unless we have
7 apples to apples, their arguments really fall apart.

8 **MAGISTRATE JUDGE FOSCHIO:** Okay. Well, let's just
9 hear a quick response to that.

10 **MR. SNYDER:** Your Honor, may I just say that --

11 **MAGISTRATE JUDGE FOSCHIO:** Do you understand his
12 point now?

13 **MR. SNYDER:** Yes, I understand it, it's nonsense.

14 **MAGISTRATE JUDGE FOSCHIO:** It's still not logical
15 to you?

16 **MR. SNYDER:** It's nonsense. I'll address the
17 merits in a minute, but my fundamental objection to all of
18 this, Your Honor, is that this is Mr. Boland's effort to
19 hijack, disrupt, interfere with the process that this Court
20 has put in place for expedited discovery and then reporting to
21 the Court on the findings of that expedited discovery.

22 And what he's doing by engaging in this very
23 merits-based discussion about evidence before his client has
24 produced all the evidence to us -- six months of
25 non-compliance is --

1 **MAGISTRATE JUDGE FOSCHIO:** I know --

2 **MR. SNYDER:** -- premature -- and so I -- on my -- I
3 object to even -- I -- I -- I respectfully suggest that --
4 Your Honor, I'll address the merits just to complete the
5 record because Your Honor asked, but that this motion and the
6 other motions that go to probe -- prohibiting us from
7 producing evidence should be denied without discussion of the
8 merits at this point as premature, inconsistent and in
9 conflict with the expedited discovery orders, which require
10 defendants to present all the evidence of fraud following the
11 defendants' (sic) compliance with the discovery orders, which
12 he has not yet done.

13 And so --

14 **MAGISTRATE JUDGE FOSCHIO:** Excuse me, Mr. Snyder,
15 if -- if discoloration is technically a form of spoliation,
16 I'm not convinced that it is, but for the sake of discussion
17 only, if it -- for the sake of discussion only is --

18 **MR. SNYDER:** Yes.

19 **MAGISTRATE JUDGE FOSCHIO:** -- say these -- this
20 demonstration by Mr. Boland does or does not *prima facie*
21 establish that something happened over a short period of time
22 while the document was in your experts' hands that resulted
23 in --

24 **MR. SNYDER:** No, no, no, Your Honor --

25 **MAGISTRATE JUDGE FOSCHIO:** -- that result in

1 discoloration, your hands that resulted in the discoloration?

2 **MR. SNYDER:** No, Your Honor. The evidence before
3 the Court shows that something happened to the document before
4 it was produced to us for which there is no rational
5 explanation.

6 His -- his speculation that settings somehow
7 accounted for the dramatic transformation of the document
8 between January and June is pure conjecture.

9 Aginsky says in his interrogatories that the ink in
10 the Tytell scan looks nothing like the ink that he saw.

11 And our experts, which will tell the Court when we
12 move to dismiss, tried to replicate the appearance of the
13 Aginsky scans with the original document by changing settings
14 and could not replicate it even by changing every setting on
15 the scanner camera known to man.

16 And so all of the information regarding scanners
17 and the image will be presented in our final reports to the
18 Court at the close of expedited discovery, and I respectfully
19 submit that that is the time and place on a complete record,
20 which we do not now have because we're still getting evidence
21 from this plaintiff to present all these issues --

22 **MAGISTRATE JUDGE FOSCHIO:** So you would -- you
23 would deny without prejudice to renew?

24 **MR. SNYDER:** I would deny without prejudice for him
25 to make any argument that he wants to make in opposition to

1 any motion we might make in the future.

2 If he wants to argue -- if he continues to argue
3 that somehow --

4 **MAGISTRATE JUDGE FOSCHIO:** You have an answer to
5 this question about the -- about Mr. Boland's representation
6 that the document was photographed on two different occasions
7 by the plaintiff's expert --

8 **MR. SNYDER:** Yes, we will establish -- we will --

9 **MAGISTRATE JUDGE FOSCHIO:** -- and the appearance
10 that's created by his demonstration here just moments ago is
11 that there is a discoloration?

12 **MR. SNYDER:** We will establish to the Court's
13 complete satisfaction that the document underwent its physical
14 transformation before the defendants had access to it and
15 tested it and not after, yes. I have full confidence that
16 when we submit our reports --

17 **MAGISTRATE JUDGE FOSCHIO:** And when you do that,
18 the specifics of his demonstration will fall away?

19 **MR. SNYDER:** Of course, Your Honor.

20 **MAGISTRATE JUDGE FOSCHIO:** Well, I don't know.

21 **MR. SNYDER:** Yes, but -- but -- but -- but what I
22 respectfully suggest is that -- that Mr. Boland is -- is
23 acting out of order and inconsistent with the order to force a
24 discussion on all these issues because what he in effect is
25 getting now is the discovery that he's been seeking from day

1 one.

2 And that is improper because it is his client who
3 has spoliated evidence and refused to turn over, for example,
4 his MSN Microsoft e-mail account, which he still is
5 obstructing Microsoft to give us.

6 So this is in the nature of him getting discovery.
7 It's clever on Mr. Boland's part. I think these motions
8 should be summarily denied as premature, inconsistent with the
9 order.

10 And if he wants to make all these fantastical
11 arguments under oath pursuant to Rule 11 in response to our
12 motions to dismiss, we welcome it with open arms.

13 **MAGISTRATE JUDGE FOSCHIO:** Thank you. All right,
14 is that -- does that complete our discussion of the spoliation
15 argument relative to the discoloration problem with the
16 document?

17 **MR. BOLAND:** Yes, Your Honor, I believe it does.
18 And in the interest of maybe short-circuiting for the benefit
19 of everyone, the rest of the arguments, I think I -- if the
20 Court -- if the defendants were willing to give Mr. Ceglia --
21 here's his main concern, I think, that these motions underlie
22 all of them, is that they file a motion to dismiss two days
23 from now, and the Court says, "Well, Mr. Boland, you have your
24 14 days to respond and then they get to reply and that's the
25 end of it."

1 And in that motion to dismiss are a host of expert,
2 technical, legal computer issues that the normal briefing
3 period really puts us at a disadvantage because there may be
4 situations, for example, where we want to ask their experts
5 questions. "How did you arrive at this? What test did you
6 use?"

7 If the defendants are willing to agree that they
8 submit our expert reports when the Court has determined
9 Mr. Ceglia's done and we get a 60 day period before they can
10 file their motion to dismiss so that we can investigate the
11 genuine nature of this, the testing they did, et cetera and
12 then have a -- an appropriate and fair opportunity to confront
13 what would be a pretty significant motion --

14 **MAGISTRATE JUDGE FOSCHIO:** How about -- how about
15 60 day or 90 day period after it's filed?

16 **MR. BOLAND:** That's fine, too, if we had a long --

17 **MAGISTRATE JUDGE FOSCHIO:** Analogous to summary
18 judgment practice?

19 **MR. BOLAND:** I think that's fine, Your Honor, a 60
20 or 90 day window in which we would approach the Court if we
21 have good cause to do so to request the opportunity to engage
22 in either interrogatories, requesting evidence from their
23 experts --

24 **MAGISTRATE JUDGE FOSCHIO:** Depositions.

25 **MR. BOLAND:** -- depositions. Questioning

1 everything that they've done to arrive at their conclusions,
2 as I think we're entitled to do.

3 If that were the case, I think we could suspend the
4 ruling on these current pending motions and just deal with
5 that issue and go from there because this is all going to come
6 back up again in the motion to dismiss.

7 We just don't want to be compressed, and that's
8 one of the reasons I filed these to say we want it done now.

9 **MAGISTRATE JUDGE FOSCHIO:** But spoliation claims
10 ride on a different set of rails.

11 **MR. BOLAND:** It is.

12 **MAGISTRATE JUDGE FOSCHIO:** Well, would you agree to
13 withdraw those motions as well?

14 **MR. BOLAND:** The -- the only ones I'm referring
15 to -- no, Your Honor, not the spoliation regarding the
16 fingerprinting and the yellowing. I can't withdraw those.

17 **MAGISTRATE JUDGE FOSCHIO:** Well, don't you have a
18 spoliation argument as to the Harvard e-mails? No.

19 **MR. BOLAND:** We do as well, Your Honor.

20 **MAGISTRATE JUDGE FOSCHIO:** So we still have to
21 talk about that.

22 **MR. BOLAND:** We can talk briefly. Most of it's in
23 my papers, I don't have a long drawn out argument for that.

24 **MAGISTRATE JUDGE FOSCHIO:** Okay.

25 **MR. BOLAND:** But the reality is we see coming, as

1 the Court has mentioned, over Lake Erie a big motion with a
2 lot of complexity. And if we got some agreement from the
3 defendants to get us 60 or 90 day window or the Court just
4 imposed it whether they want it or not, I think that we can
5 table most of these motions and just deal with whatever their
6 dismissal motion is, confront all these issues of settings and
7 all that stuff in that response and give us a comfortable time
8 to perhaps get discovery.

9 **MR. SNYDER:** Your Honor --

10 **MR. BOLAND:** That's all.

11 **MR. SNYDER:** We would -- may I be heard? We would
12 vigorously object to that. Your Honor, it's clear what's
13 going on here. From the start this has been an attempted hold
14 up using fraudulent documents to try to coerce a settlement
15 hoping that we'll just write him a check to go away and that's
16 been the goal since day one, the very first communication in
17 this case with first counsel.

18 Thanks to Your Honor's prior orders, the fraud has
19 been exposed. The original contract, the authentic *bona fide*
20 contract has been found. It says nothing about Facebook, and
21 his contract has been exposed as a manufactured document that
22 we will prove conclusively was tampered with by this plaintiff
23 and perhaps others acting in concert with him; and his prior
24 lawyers and experts abandoned him in droves, fleeing from this
25 case and the potential liability for bringing it; and now his

1 sixth lawyer on the case is trying this hail Mary saying --
2 filing all sorts of outrageous, audacious motions asking for
3 spoliation sanctions and default judgments causing us to come
4 yet another time to this Court on motions that never should
5 have been filed, all to keep alive this shakedown effort.

6 That is his purpose. He's delayed six months
7 producing the discovery. He should be rewarded with a 60 or
8 90 day grace period to respond to motions of which he knows
9 the contents? He knows -- if this is an authentic contract,
10 he knows what's coming.

11 The ink, if there's any -- the ink is wet. It's
12 fewer than two years old.

13 **MAGISTRATE JUDGE FOSCHIO:** Okay, okay.

14 **MR. SNYDER:** He knows what all the issues are and
15 so what he's doing here is keeping the case alive for as long
16 as he can.

17 And let me say, Your Honor, that was the purpose of
18 this six month delay tactic, keep the case alive long enough
19 to exert maximum pressure on Facebook in the public arena and
20 otherwise to get them to write him a check under the guise of
21 all these frivolous motions, going to Ireland, spoliating
22 evidence and now it's six or seven months later and he figures
23 if he keeps the whole case alive, 60 days, 90 days, we're
24 gonna write him a big fat check, which is never gonna happen.

25 But the courts are not a joke and the courts are

1 not used -- are not an appropriate mechanism for a shakedown.
2 And this case has gone on far too long.

3 When we move to dismiss, this defendant (sic)
4 should not be rewarded for his conduct and given a grace
5 period. If he needs some extra time, a week, a couple of
6 weeks, but to give him three months to respond to a motion
7 where we have overwhelming evidence of fraud is outrageous.

8 To give him discovery, reciprocal discovery when
9 we --

10 **MAGISTRATE JUDGE FOSCHIO:** He hasn't had any.

11 **MR. SNYDER:** And is entitled to none the way he
12 comes to this court. He's entitled to no discovery.

13 And when we move to dismiss, we will lay that out.
14 And I have every confidence that the Second Circuit not only
15 would approve that, but would applaud the notion that a party
16 committing a massive litigation fraud and then conducting
17 egregious discovery violations --

18 **MAGISTRATE JUDGE FOSCHIO:** According to his experts
19 they found no indication of fraud. For example, the detailed
20 analysis by -- which expert was it of the e-mails that were on
21 the floppies?

22 **MR. BOLAND:** Mr. Grant.

23 **MAGISTRATE JUDGE FOSCHIO:** Mr. Grant.

24 **MR. SNYDER:** No, no, Your Honor, that's not
25 accurate. Mr. Grant did not review the e-mails. He -- he has

1 a blanket assertion that he found no evidence of fraud, but he
2 doesn't address the e-mails.

3 He addresses unspecified characteristics perhaps of
4 the floppy disks themselves, but he doesn't address the actual
5 so-called "e-mails."

6 His experts don't --

7 **MAGISTRATE JUDGE FOSCHIO:** What about his experts
8 that have examined the document and found the impressions were
9 the same, the stapling was the same --

10 **MR. SNYDER:** The experts have not addressed --

11 **MAGISTRATE JUDGE FOSCHIO:** -- the paper was the
12 same, the paper is consistent --

13 **MR. SNYDER:** Your Honor, we will -- Your Honor,
14 here's what's unfair. I could address all those points now,
15 but pursuant to this Court's order I was prepared to do that
16 in -- in -- in -- in September.

17 **MAGISTRATE JUDGE FOSCHIO:** Okay.

18 **MR. SNYDER:** And Facebook has been subjected --

19 **MAGISTRATE JUDGE FOSCHIO:** Okay.

20 **MR. SNYDER:** -- to the burden and oppression of
21 this litigation now --

22 **MAGISTRATE JUDGE FOSCHIO:** Okay, let's move --

23 **MR. SNYDER:** -- but let me just say to Your Honor
24 the purpose of this delay tactic is not coincidental. The
25 reason he and his parade of lawyers have an interest in

1 keeping this case alive as long as possible, which is why they
2 have delayed compliance and why they're looking to now throw a
3 longer three month hail Mary is because their gambit is the
4 longer this case hangs over Facebook's head, given Facebook's
5 stature and status --

6 **MAGISTRATE JUDGE FOSCHIO:** Business plans.

7 **MR. SNYDER:** -- whatever, the longer it hangs over
8 our heads, the more likely they're going to line their pockets
9 based on an outright, outrageous fraud.

10 That's never gonna happen in -- but that is --
11 they're never gonna get a dime, but --

12 **MAGISTRATE JUDGE FOSCHIO:** You've already made that
13 clear so --

14 **MR. SNYDER:** -- but they -- but they believe, and
15 that's why they believe otherwise, which is why they've
16 delayed at every turn, which is why we've been pressing --

17 **MAGISTRATE JUDGE FOSCHIO:** I know, all right,
18 let's move on then, let's move on --

19 **MR. SNYDER:** We're prepared to move on, but, Your
20 Honor, this plaintiff continues to be in defiance of this
21 Court's order almost seven months later.

22 For example, he recently obstructed our effort to
23 get his Microsoft e-mails. He provided an ink --

24 **MAGISTRATE JUDGE FOSCHIO:** That's not before me,
25 right?

1 **MR. SNYDER:** No, but hopefully -- hopefully we're
2 trying to resolve everything. Hope springs eternal.

3 **MAGISTRATE JUDGE FOSCHIO:** Good, good. Keep doing
4 that.

5 **MR. SNYDER:** But -- but -- but he's still not in
6 compliance. When he's in compliance, he will file -- he
7 will -- he will submit a declaration of compliance, we will
8 give him the Harvard e-mails and we'll move to dismiss.

9 **MAGISTRATE JUDGE FOSCHIO:** Okay.

10 **MR. SNYDER:** But -- but -- but we -- but if the
11 Court is entertaining --

12 **MAGISTRATE JUDGE FOSCHIO:** I --

13 **MR. SNYDER:** -- a -- a -- a extraordinary, unusual
14 grace period for him to contemplate things --

15 **MAGISTRATE JUDGE FOSCHIO:** I was just looking for a
16 short-circuit here so that we didn't have to spend more time
17 reviewing the motions. I'm, you know, going to make an effort
18 to make some rulings here as soon as I have everybody's input,
19 I guess that's the way to put it.

20 **MR. SNYDER:** I just don't want the Court to think
21 that the extension of time here is made for some good faith
22 purpose. It's made for the same purpose that this lawsuit was
23 filed on day one, which is to shakedown my client.

24 **MAGISTRATE JUDGE FOSCHIO:** Thank you. What motion
25 do you want to move on to?

1 **MR. BOLAND:** I can fairly assume that the 60 or 90
2 day offer to the defendants have been rejected?

3 **MAGISTRATE JUDGE FOSCHIO:** I'm not taking a
4 position on it.

5 **MR. BOLAND:** Very well.

6 **MAGISTRATE JUDGE FOSCHIO:** You can at the
7 appropriate time ask for the appropriate relief --

8 **MR. BOLAND:** Very well.

9 **MAGISTRATE JUDGE FOSCHIO:** -- whether it's
10 discovery or just a regular scheduling order to start
11 opposing.

12 So what motion do we want to take up next?

13 **MR. BOLAND:** The motion for expedited -- to end
14 expedited discovery, Your Honor.

15 **MAGISTRATE JUDGE FOSCHIO:** Well, what about all the
16 other prohibitional motions and spoliation issues? The
17 Harvard e-mails? The smoking gun StreetFax contract?

18 **MR. SNYDER:** (Inaudible.)

19 **MR. BOLAND:** I'll go ahead and go with whatever one
20 the Court prefers next.

21 **MAGISTRATE JUDGE FOSCHIO:** Whatever you want,
22 whatever -- whichever motion --

23 **MR. BOLAND:** So that's why I was suggesting the end
24 of expedited discovery. This -- I reviewed, Your Honor, a
25 bunch of the transcripts -- all the transcripts in this case

1 more than once and it's clear from those transcripts --

2 **MAGISTRATE JUDGE FOSCHIO:** Wouldn't that --
3 wouldn't this issue come at the end of the other issues, the
4 spoliation issues, the prohibitional issues? Wouldn't you
5 want to cover that first while we're talking about that?

6 **MR. BOLAND:** Well, here's why I think not. Because
7 if the Court --

8 **MAGISTRATE JUDGE FOSCHIO:** Okay.

9 **MR. BOLAND:** -- were to rule expedited discovery
10 has run its course, the promises the defendants made, which
11 underlie the judge's decision, and I think it's fair to
12 characterize the Court's decision as reluctant, but felt good
13 cause was shown at that time, if the Court decides, you know
14 what? That good cause has evaporated, then all these issues
15 about them being prohibited from referencing evidence in a
16 motion to dismiss on fraud on the Court I think evaporate
17 because that motion now would be not appropriate.

18 We have to finish discovery before they can even
19 file it, and then we can resolve those at a later time. In
20 fact, we can attack those when they raise those.

21 **MAGISTRATE JUDGE FOSCHIO:** I don't think they're
22 done with expedited discovery. That's the whole point of
23 Mr. Snyder's statement.

24 **MR. BOLAND:** I agree, I agree that they don't feel
25 that they're done. And what I'm submitting to the Court is I

1 think time has run out.

2 **MAGISTRATE JUDGE FOSCHIO:** I mean, for example,
3 I've been waiting with baited breath for Mr. Ceglia to
4 complete the disclosure of the -- of the disk drives and so
5 forth, and --

6 **MR. BOLAND:** That was done, Your Honor.

7 **MAGISTRATE JUDGE FOSCHIO:** -- and the other e-mails
8 and so forth so that you can be given the mirror copy of the
9 so-called Harvard e-mails between Mr. Zuckerberg and
10 Mr. Ceglia, which we authorize and we want you to have.

11 And I don't know that that's been done. I've been
12 waiting for that because at that point, in my view, the
13 expedited discovery cycle will have run its course, except for
14 your motions --

15 **MR. BOLAND:** Yes, Your Honor, and --

16 **MAGISTRATE JUDGE FOSCHIO:** -- which in an arguable
17 way go beyond that because they are what they are. They
18 really don't deal with discovery per se.

19 **MR. BOLAND:** And what the plaintiff's position is,
20 is that today -- actually before today, but definitely at the
21 time we filed this motion to end expedited discovery, the --

22 **MAGISTRATE JUDGE FOSCHIO:** Well, have -- have you
23 received the Harvard e-mails on the disks that Mr. Snyder's
24 been carrying in his --

25 **MR. BOLAND:** No.

1 **MAGISTRATE JUDGE FOSCHIO:** -- in his coat pocket
2 all these months?

3 **MR. BOLAND:** No, but the declaration you refer to
4 was provided on time to the defendants pursuant to the Court's
5 order.

6 **MAGISTRATE JUDGE FOSCHIO:** Including the issues
7 denominated in footnote number 1 of one of the defendants'
8 documents, which --

9 **MR. BOLAND:** The MSN --

10 **MAGISTRATE JUDGE FOSCHIO:** -- which elaborated all
11 of the -- the deficiencies in the plaintiff's --

12 **MR. BOLAND:** The searching?

13 **MAGISTRATE JUDGE FOSCHIO:** -- providing of, I
14 think, e-mail account information and --

15 **MR. BOLAND:** Yes.

16 **MAGISTRATE JUDGE FOSCHIO:** -- and others? That's
17 all done?

18 **MR. BOLAND:** The MSN issue, he did it all in a
19 timely basis and MSN Microsoft kicked back the form to Mr.
20 Southwell saying --

21 **MAGISTRATE JUDGE FOSCHIO:** Well, that's an
22 example --

23 **MR. BOLAND:** -- something was wrong. And he
24 couldn't explain and --

25 **MAGISTRATE JUDGE FOSCHIO:** Right.

1 **MR. BOLAND:** -- Mr. Southwell couldn't explain, I
2 think he did make an effort to figure out what they thought
3 was wrong with it --

4 **MAGISTRATE JUDGE FOSCHIO:** Okay.

5 **MR. BOLAND:** -- so my client filled it out again
6 and submitted it yesterday.

7 **MAGISTRATE JUDGE FOSCHIO:** He came back from
8 Ireland and he searched for the hard drives and he's provided
9 adequate explanation? Oh, sorry.

10 He came back from Ireland, he's undergone a --
11 undertaken a thorough search --

12 **MR. BOLAND:** Yes.

13 **MAGISTRATE JUDGE FOSCHIO:** -- of all the potential
14 locations for these drives, including the Seagate drive, which
15 was not a flash drive, and he's now accounted for that in
16 strict accordance with the order, which is what we directed
17 him to do, once again, the last time we were together?

18 **MR. BOLAND:** Yes. He didn't use agents. He
19 searched himself.

20 **MAGISTRATE JUDGE FOSCHIO:** Excellent. Well,
21 then -- and then Mr. -- the defendants have turned over
22 this -- this copy of the e-mails from the Harvard servers?

23 **MR. BOLAND:** No.

24 **MAGISTRATE JUDGE FOSCHIO:** No? And you've not
25 asked them to do that?

1 **MR. BOLAND:** No, because they are claiming that
2 there is additional information as they footnoted in their
3 latest filing that they haven't yet received from Capsicum and
4 some other expert or individual, Mr. Argentieri, some such
5 thing.

6 **MAGISTRATE JUDGE FOSCHIO:** But that's, according to
7 you, that's not a major -- that's not a major obstacle to
8 completing the expedited discovery cycle.

9 **MR. BOLAND:** No, correct.

10 **MR. SNYDER:** There's six areas where the plaintiff
11 remains deficient, one of which was the motion -- subject of
12 our motion to compel today the Jerry Grant 41 floppy disks.

13 The second is a -- I mean, I can get into the --
14 there are -- there are six -- there are six discrete areas,
15 which are not before the Court because we're hoping --

16 **MAGISTRATE JUDGE FOSCHIO:** To avoid it --

17 **MR. SNYDER:** -- to avoid that.

18 **MAGISTRATE JUDGE FOSCHIO:** -- the motion.

19 **MR. SNYDER:** Except the one we did bring before the
20 Court, Grant. So other than Grant, there are one, two, three,
21 four, five other outstanding issues, which we're working
22 through and when we get the evidence in those other
23 categories, I can outline them or detail them, we will happily
24 provide plaintiff in accordance with the judge -- Your Honor's
25 order with the Harvard e-mails and promptly thereafter move to

1 dismiss this lawsuit with our expert affidavits in support
2 and --

3 **MAGISTRATE JUDGE FOSCHIO:** So in light of that, why
4 are you making this motion?

5 **MR. BOLAND:** Well, first off, Your Honor, the
6 motion was made several weeks ago and now obviously it's for a
7 hearing today.

8 **MAGISTRATE JUDGE FOSCHIO:** Right.

9 **MR. BOLAND:** And it's -- it's our position that the
10 entirety of the -- the basis for expedited discovery was a
11 claim by Mr. Snyder, which the Court quizzed him on --

12 **MAGISTRATE JUDGE FOSCHIO:** Mm-hmm.

13 **MR. BOLAND:** -- that all experts would agree the
14 contract between Zuckerberg and Ceglia is a fraud, and that
15 all the experts would agree the e-mail exchanges that my
16 client offered are frauds.

17 I think -- and the Court even used the phrase
18 "dueling experts, Mr. Snyder, how do we not get to a jury
19 trial?"

20 And we -- I think it's a fair inference for the
21 Court to make no matter what their experts say now about this
22 document, the best they can do is dueling experts.

23 And no matter what their experts say about the
24 e-mails, "Well, Your Honor, we found some evidence that the
25 other expert overlooked or he minimized," et cetera, this is

1 the stuff of garden variety jury trials. It's dueling experts
2 yet again.

3 They're never going to make it past the Court's own
4 questioning at the outset of "how do you get to a dismissal on
5 fraud with dueling experts?"

6 Now, Mr. Snyder promised you there wouldn't be
7 dueling experts. And then secondly he promised you even if
8 this contract is so well-done by my client that we can't
9 detect the fraud on the e-mails alone, if we prove they're
10 fraudulent, we should get a dismissal, and there was a
11 colloquy between you and him about that.

12 And our position is it doesn't matter what happens
13 from today forward. They can't get there to a dismissal on
14 fraud.

15 Moreover, those are the bases for expedited
16 discovery, and I think we can all agree they've evaporated.
17 There is no universal agreement on fraud on the contract and
18 fraud on the e-mails.

19 In fact, up to today the only evidence you have is
20 that the contract is actually authentic and the e-mails were
21 actually generated and saved back in 2003. So you have
22 actually the reverse of what they promised.

23 And the one-sided discovery, there's a time factor
24 here. The longer it goes on, there's a potential for
25 witnesses to forget information, for evidence to go missing

1 that I don't even know is out there yet until I've questioned
2 some of their witnesses. There's Facebook itself and its
3 business plans, as you hinted, which are rapidly changing.

4 There will be an issue in the future because of the
5 e-mails we have. Facebook's source code is connected to the
6 source code Zuckerberg designed for StreetFax. So we are
7 going to have a massive battle coming when we ask in discovery
8 for a copy of Facebook's source code to which we're entitled
9 because if we compare those, and there's a lot of copying from
10 the stuff Zuckerberg did for StreetFax into what was in early
11 or current versions of Facebook's source code, that's another
12 huge element of proof of the contract and the agreement
13 between these two individuals.

14 **MAGISTRATE JUDGE FOSCHIO:** Well, you won't be
15 amending to add a copyright violation? No?

16 **MR. BOLAND:** Perhaps, Your Honor.

17 **MAGISTRATE JUDGE FOSCHIO:** Or, you know, or work --
18 a true work-for-hire claim.

19 **MR. BOLAND:** Absolutely. But my point is time does
20 matter. If it takes two weeks, four weeks, six weeks, we want
21 it to end --

22 **MAGISTRATE JUDGE FOSCHIO:** Okay.

23 **MR. BOLAND:** -- now.

24 **MAGISTRATE JUDGE FOSCHIO:** Well, I need to get -- I
25 need to dispose of these motions. So pick up a -- that motion

1 is denied.

2 **MR. BOLAND:** Very well.

3 **MAGISTRATE JUDGE FOSCHIO:** Let's move on. Add that
4 to your list, Mr. Southwell.

5 All right, smoking gun, StreetFax, this is the --

6 **MR. BOLAND:** It's the use of the digital image and
7 e-mail.

8 **MAGISTRATE JUDGE FOSCHIO:** Yes, the e-mail issue
9 you -- and this one you want to -- what is your request? To
10 render -- preclude the use of this information in any
11 dispositive motion? Is that it?

12 **MR. BOLAND:** Yes, Your Honor, by rule that I stated
13 in the --

14 **MAGISTRATE JUDGE FOSCHIO:** Mm-hmm.

15 **MR. BOLAND:** -- papers that I filed in the --

16 **MAGISTRATE JUDGE FOSCHIO:** And the theory is simply
17 that there's no authentic -- there's no authentication of
18 the -- of the contract, which was attached to the e-mail
19 ostensibly from Ceglia to Cole and --

20 **MR. BOLAND:** And there's no authentication of the
21 e-mail itself, either one.

22 **MAGISTRATE JUDGE FOSCHIO:** Either one?

23 **MR. BOLAND:** Correct.

24 **MAGISTRATE JUDGE FOSCHIO:** And -- and also the fact
25 that they argued attorney-client privilege is not inconsistent

1 with making the argument that there's no basis to believe that
2 this document is even valid?

3 **MR. BOLAND:** Correct, Your Honor.

4 **MAGISTRATE JUDGE FOSCHIO:** Even -- even -- it's
5 even -- what's the word I'm looking for? Authentic.

6 **MR. BOLAND:** Authentic. If it's not admissible
7 evidence, they shouldn't be able to rely on it in their papers
8 that they filed.

9 **MAGISTRATE JUDGE FOSCHIO:** Yet there it is.

10 **MR. BOLAND:** Pardon me?

11 **MAGISTRATE JUDGE FOSCHIO:** There it is. There is
12 the document, and it's ostensibly from an e-mail account
13 associated either with the plaintiff or we now learn from your
14 papers the plaintiff's father, maybe even his mother.

15 And it ends up in Mr. Cole's computer storage or
16 reference, if you will --

17 **MR. BOLAND:** Yes.

18 **MAGISTRATE JUDGE FOSCHIO:** -- in his account -- in
19 his database, for want of an easier term.

20 **MR. BOLAND:** That doesn't authenticate it though.
21 It just shows you where it's located.

22 **MAGISTRATE JUDGE FOSCHIO:** Well, the fact that your
23 client concedes that he had a -- an attorney-client or some
24 business relationship with Mr. Cole --

25 **MR. BOLAND:** True.

1 **MAGISTRATE JUDGE FOSCHIO:** -- is a fact.

2 **MR. BOLAND:** Yes.

3 **MAGISTRATE JUDGE FOSCHIO:** Yes.

4 **MR. BOLAND:** But that doesn't authenticate an
5 e-mail.

6 **MAGISTRATE JUDGE FOSCHIO:** And it is true that Mr.
7 Cole has something to do with the StreetFax project.

8 **MR. BOLAND:** He did. He provided advice, legal
9 advice, at the very least during that time.

10 **MAGISTRATE JUDGE FOSCHIO:** And that the document
11 that you're challenging references the StreetFax project.

12 **MR. BOLAND:** It does, Your Honor. None of which
13 satisfy authentication.

14 **MAGISTRATE JUDGE FOSCHIO:** Is that right?

15 **MR. BOLAND:** Because both the sender -- alleged
16 sender and alleged recipient of that document don't have any
17 recollection of authoring it. And there's no one stepping --

18 **MAGISTRATE JUDGE FOSCHIO:** You don't think that
19 those -- just those three items I mentioned are evidence
20 sufficient to support a finding that the matter in question is
21 what its proponent claims?

22 **MR. BOLAND:** No, I don't -- I don't believe that at
23 all, Your Honor.

24 **MAGISTRATE JUDGE FOSCHIO:** Why not?

25 **MR. BOLAND:** Because -- because both the sender and

1 the recipient contradict it.

2 **MAGISTRATE JUDGE FOSCHIO:** What is it evidence --
3 what are those three factors evidence of?

4 **MR. BOLAND:** They're -- they're evidence of
5 nothing, Your Honor --

6 **MAGISTRATE JUDGE FOSCHIO:** Of nothing?

7 **MR. BOLAND:** -- because the sender and the
8 recipient are both saying "we don't have any recollection of
9 sending that."

10 **MAGISTRATE JUDGE FOSCHIO:** The e-mail fairy got
11 into the act and decided to conjure up this document and send
12 it off to Mr. Cole and oh, by the way, of all the millions of
13 people that they could have indicated as the source, decided
14 to pick the Ceglias.

15 **MR. BOLAND:** Well, I don't think it would be an
16 e-mail fairy, I don't think it's --

17 **MAGISTRATE JUDGE FOSCHIO:** Well, what -- how would
18 you account for such an electronic happenstance?

19 **MR. BOLAND:** Well, it just so happens that this is
20 an e-mail sent with a document that is obviously forged. It's
21 not the actual contract between these two parties.

22 **MAGISTRATE JUDGE FOSCHIO:** That begs the
23 question --

24 **MR. BOLAND:** And the person who benefits the
25 most --

1 **MAGISTRATE JUDGE FOSCHIO:** That begs the question.

2 **MR. BOLAND:** And the person who benefits most from
3 the existence of this e-mail and this document is
4 Mr. Zuckerberg, who will not deny reports that he --

5 **MAGISTRATE JUDGE FOSCHIO:** He would be the
6 proponent under the Federal Rules of Evidence.

7 **MR. BOLAND:** But here's -- here's the kicker, Your
8 Honor: He's an individual who doesn't deny hacking e-mail
9 accounts and forging documents as he's testified.

10 **MAGISTRATE JUDGE FOSCHIO:** Well, I think you're
11 doing what I had to hammer into my students in evidence this
12 past semester, which is always a difficult task, and that is
13 the difference between admissibility and weight.

14 **MR. BOLAND:** And it's our position --

15 **MAGISTRATE JUDGE FOSCHIO:** You don't think these
16 facts are circumstantial evidence of authenticity?

17 **MR. BOLAND:** I think they're circumstantial. I
18 just don't think they're sufficient to make it in this.

19 **MAGISTRATE JUDGE FOSCHIO:** Thus, an issue of
20 weight, not admissibility under Rule 901.

21 All right, the motion as to this -- this smoke -- I
22 don't know what else to call it, Mr. Southwell, the smoking
23 gun issue, this would be document number 22 -- what is it?

24 **MR. SNYDER:** 229, Your Honor.

25 **MAGISTRATE JUDGE FOSCHIO:** 228, 229 is denied for

1 the reasons stated, both in the defendants' papers and based
2 on oral argument.

3 Let's move on to another issue.

4 **MR. BOLAND:** Your Honor, the Harvard e-mails --

5 **MAGISTRATE JUDGE FOSCHIO:** The Harvard e-mails, oh,
6 yes. This has to do with Mr. Rose's inability to allegedly
7 explain the apparent difference between the 17 e-mails that he
8 found some variation in that were -- one was processed in
9 October of 2010, and then there was another processing or
10 extraction of these e-mails in -- in April of 2011.

11 You argue that there was -- there were deletions
12 and, therefore, it was spoliated in the hands of the
13 defendants' expert, correct?

14 **MR. BOLAND:** Or at the hands of the defendant
15 himself. I couldn't know.

16 **MAGISTRATE JUDGE FOSCHIO:** Really?

17 **MR. BOLAND:** Or at Harvard's -- who knows where it
18 was spoliated.

19 **MAGISTRATE JUDGE FOSCHIO:** Well, if it happened at
20 Harvard, how can that be attributed to the defendants?

21 **MR. BOLAND:** Well, it couldn't be.

22 **MAGISTRATE JUDGE FOSCHIO:** Do you have any evidence
23 whatsoever, any that Mr. Zuckerberg picked up the phone and
24 called the head of the Harvard IT Department and said, "I want
25 you to change these e-mails that are sitting in your server

1 that were created way back in 2003-2004"?

2 **MR. BOLAND:** I have no evidence whatsoever that he
3 made a call to them.

4 **MAGISTRATE JUDGE FOSCHIO:** I thought not.

5 **MR. BOLAND:** He's the only person that has access
6 to the account, and our -- the point of this motion is --
7 is -- and I won't belabor it --

8 **MAGISTRATE JUDGE FOSCHIO:** And you know that
9 Harvard's system for preserving their e-mails in those servers
10 permits a person in Mr. Zuckerberg's position during the
11 relevant timeframe to go into the account and alter them?

12 **MR. BOLAND:** It's his e-mail account. Certainly he
13 could delete e-mails from his own account or --

14 **MAGISTRATE JUDGE FOSCHIO:** You didn't answer my
15 question.

16 **MR. BOLAND:** -- or alter them.

17 **MAGISTRATE JUDGE FOSCHIO:** He's no longer a
18 student. Been out of there for however many years...eight
19 years now since he was there?

20 Do you know whether or not Harvard's system permits
21 such tampering?

22 **MR. BOLAND:** You're presupposing he doesn't have
23 the account. I don't have any evidence that he doesn't.

24 **MAGISTRATE JUDGE FOSCHIO:** You're the one that made
25 the motion. You have the burden.

1 **MR. BOLAND:** I understand that, Your Honor.
2 That's -- this is his e-mail account that he used in the
3 relevant time period of this case, 2003-2004, and there's no
4 evidence he discontinued using it.

5 **MAGISTRATE JUDGE FOSCHIO:** Okay, let's try it this
6 way. What -- what is it that happened in October of 2010 with
7 regard to the e-mails?

8 **MR. BOLAND:** I don't know what happened, but
9 Mr. Zuckerberg's the only one involved in this case who had
10 access to those e-mails.

11 **MAGISTRATE JUDGE FOSCHIO:** Well, what is it that
12 the expert ended up with?

13 **MR. BOLAND:** Pardon me?

14 **MAGISTRATE JUDGE FOSCHIO:** What did the expert end
15 up with?

16 **MR. BOLAND:** The expert ended up with a conclusion
17 that different e-mails are actually the same, which is false.

18 **MAGISTRATE JUDGE FOSCHIO:** That implies that the
19 expert got ahold of something from Harvard in October of 2010?

20 **MR. BOLAND:** Well, he got ahold of the e-mail
21 record of Zuckerberg, yes.

22 **MAGISTRATE JUDGE FOSCHIO:** And how did he do that?

23 **MR. BOLAND:** He details it in his declaration. I
24 think that he either -- they gave it to him or he was allowed
25 to attach to their server and grab it. I don't remember

1 which.

2 **MAGISTRATE JUDGE FOSCHIO:** Okay. So he downloaded
3 how many e-mails?

4 **MR. BOLAND:** I don't know. He grabbed the whole
5 record and then searched through it, according to his
6 declaration, and found about 175 e-mails.

7 **MAGISTRATE JUDGE FOSCHIO:** Pertinent to the
8 subject?

9 **MR. BOLAND:** Right. And then he was able to say,
10 according to him, no e-mails that came up as a result of some
11 search terms he used.

12 **MAGISTRATE JUDGE FOSCHIO:** And your motion for
13 sanctions based on spoliation is that when he did it again,
14 and I'm not clear about this, in April of 2011, he discovered
15 discrepancies?

16 **MR. BOLAND:** Correct.

17 **MAGISTRATE JUDGE FOSCHIO:** How did he access the
18 Harvard servers in April of 2011?

19 **MR. BOLAND:** His declaration details one of the two
20 times he went there and attached to their servers, my
21 understanding. And the other time, I don't know which one it
22 was, they actually handed him a copy of the e-mail record.

23 But the declarations would clear that up.

24 **MAGISTRATE JUDGE FOSCHIO:** Always happens, can't
25 find it when I want to. I'm looking for Mr. -- what's his

1 name's -- declaration.

2 **MR. SNYDER:** Your Honor, the declaration of Brian
3 Rose is document number 47; and then he has filed a
4 supplemental declaration, which is document 73.

5 **THE CLERK:** 47 and 73?

6 **MR. SNYDER:** Mm-hmm.

7 **MAGISTRATE JUDGE FOSCHIO:** I have it, but I can't
8 find it. Okay.

9 **MR. SNYDER:** Shall I hand them up to Your Honor?

10 **MAGISTRATE JUDGE FOSCHIO:** Yes, that will be
11 helpful. I now have one of them, thank you.

12 **THE CLERK:** Which one?

13 **MAGISTRATE JUDGE FOSCHIO:** I have the number 73
14 declaration, and I don't have the supplemental. Oh, that is
15 the supplemental. Okay.

16 **MR. BOLAND:** So in 47 --

17 **MAGISTRATE JUDGE FOSCHIO:** What I want to
18 understand, and apparently I was not able to understand it
19 from this declaration, is: What is it that he got in April of
20 2011 that allowed him to make a comparison with what he got in
21 October of 2010?

22 That's what I'm not clear about.

23 **MR. BOLAND:** In paragraph 4 --

24 **MAGISTRATE JUDGE FOSCHIO:** One at a time.

25 **MR. BOLAND:** -- he says he got the entire contents

1 of Mr. Zuckerberg's Harvard e-mail account as it resided on
2 Harvard's server.

3 **MAGISTRATE JUDGE FOSCHIO:** Well, that's not in this
4 document, so I do need another document that shows that,
5 please. Thank you.

6 All right.

7 **MR. SNYDER:** It's paragraphs 4 and 5 of document
8 47, Your Honor.

9 **MAGISTRATE JUDGE FOSCHIO:** Well, it doesn't tell me
10 the answer to my question, which is: How did he get it? What
11 did he ask for? Is that the same material that he got in
12 October?

13 No. It must be something else because there's --
14 the plaintiff is attempting to point to a variation.

15 **MR. SNYDER:** Yes, Your Honor. May I explain?

16 **MAGISTRATE JUDGE FOSCHIO:** He asked Harvard to
17 provide something in April? I'm trying to account for the --

18 **MR. SNYDER:** I can explain.

19 **MAGISTRATE JUDGE FOSCHIO:** -- discrepancy that is
20 claimed to be explained by the concept of de-duplication.

21 **MR. SNYDER:** Yes, Your Honor, I'll explain.

22 **MAGISTRATE JUDGE FOSCHIO:** We think is a misnomer.

23 **MR. SNYDER:** I'll explain it, Your Honor.

24 In October of 2010 Harvard University, on its own
25 accord, captured, made an image of Mr. Zuckerberg's Harvard

1 e-mail account as it resided on Harvard's server in October
2 2010.

3 **MAGISTRATE JUDGE FOSCHIO:** Harvard made a copy in
4 October of 2010.

5 **MR. SNYDER:** 2010.

6 **MAGISTRATE JUDGE FOSCHIO:** At whose request?

7 **MR. SNYDER:** On its own accord.

8 **MAGISTRATE JUDGE FOSCHIO:** Why?

9 **MR. SNYDER:** There may have been a document
10 preservation request related to (Inaudible) --

11 **MAGISTRATE JUDGE FOSCHIO:** When -- when did you
12 serve the -- Mrs. Simpson received a letter from the plaintiff
13 at some point about a document hold?

14 **MR. BOLAND:** Yes, Your Honor, within the first
15 few -- first month or two of the litigation, I don't have it
16 off the top of my head, but it was early on.

17 **MAGISTRATE JUDGE FOSCHIO:** Yeah, it's one of the
18 exhibits.

19 **MR. BOLAND:** It is an exhibit.

20 **MR. SNYDER:** Your Honor, we don't know why they did
21 it. They never explained. We think it may have been because
22 the plaintiff s called them.

23 But for whatever reason, Harvard on its -- not in
24 response to our request, imaged the server in October 2010.

25 In addition --

1 **MAGISTRATE JUDGE FOSCHIO:** What does that mean,
2 "imaged the server"?

3 **MR. SNYDER:** Made a copy of all e-mails in Mark
4 Zuckerberg's Harvard account as of October 2010.

5 **MAGISTRATE JUDGE FOSCHIO:** And that would have been
6 over a what? Two-year period while he was enrolled there?

7 **MR. SNYDER:** Whatever -- whatever -- whatever --
8 whatever time period he was --

9 **MAGISTRATE JUDGE FOSCHIO:** Well, he left at the end
10 of his second year, right?

11 **MR. BOLAND:** It's not indicated by Mr. Rose how far
12 back that e-mail record goes. He simply says "Harvard gave me
13 what they captured on that date."

14 **MR. SNYDER:** Mr. Rose, again, will explain all this
15 when he --

16 **MAGISTRATE JUDGE FOSCHIO:** How did Mr. Rose happen
17 to become in contact with Harvard in order to get it?

18 **MR. SNYDER:** In -- in -- in April of 2011 --

19 **MAGISTRATE JUDGE FOSCHIO:** No. Didn't he receive
20 something in October?

21 **MR. SNYDER:** No.

22 **MAGISTRATE JUDGE FOSCHIO:** No?

23 **MR. SNYDER:** In April of 2011, at the direction of
24 our firm, Stroz Friedberg preserved the contents of
25 Mr. Zuckerberg's Harvard e-mail account by using --

1 **MAGISTRATE JUDGE FOSCHIO:** It wasn't until April,
2 did you say?

3 **MR. SNYDER:** Correct. This preservation work
4 involved, as he recounts, making a complete and accurate copy
5 of the entire contents of Mr. Zuckerberg's Harvard e-mail
6 account as it resided on Harvard's server at the time of
7 collection in April of 2011.

8 **MAGISTRATE JUDGE FOSCHIO:** Well, you --

9 **MR. SNYDER:** In addition --

10 **MAGISTRATE JUDGE FOSCHIO:** -- you didn't know about
11 the --

12 **MR. SNYDER:** -- in addition, Harvard, at around
13 that time provided Stroz Friedberg with a copy of the e-mail
14 account as they captured it themselves in October 2010.

15 So he was given that --

16 **MAGISTRATE JUDGE FOSCHIO:** Stroz Friedberg was able
17 to go into the Harvard server in October and --

18 **MR. SNYDER:** No, Your Honor.

19 **MAGISTRATE JUDGE FOSCHIO:** No? I'm not catching --

20 **MR. SNYDER:** No.

21 **MAGISTRATE JUDGE FOSCHIO:** I'm not getting it.

22 **MR. SNYDER:** In October 2010 Harvard on its own --

23 **MAGISTRATE JUDGE FOSCHIO:** Harvard on its own makes
24 a mirror image of the account?

25 **MR. SNYDER:** Correct.

1 **MAGISTRATE JUDGE FOSCHIO:** And holds it in-house
2 for reasons that aren't clear?

3 **MR. SNYDER:** Correct, correct.

4 **MAGISTRATE JUDGE FOSCHIO:** In-house.

5 **MR. SNYDER:** Mm-hmm.

6 **MAGISTRATE JUDGE FOSCHIO:** To themselves? They
7 don't disseminate it to anybody as far as we know?

8 **MR. SNYDER:** As far as we know.

9 **MAGISTRATE JUDGE FOSCHIO:** Okay.

10 **MR. SNYDER:** In -- in April Stroz Friedberg, after
11 the amended complaint was filed, using Mr. Zuckerberg's access
12 credentials accessed the Harvard account and made a complete
13 and accurate copy of the entire contents of his e-mail as it
14 resided on Harvard's server at the time of the collection.

15 **MAGISTRATE JUDGE FOSCHIO:** So they made a -- their
16 own copy?

17 **MR. SNYDER:** Correct.

18 **MAGISTRATE JUDGE FOSCHIO:** When you say Zuckerberg
19 had access credentials, does that -- should I infer from that
20 that Mr. Zuckerberg did have access, contrary to what I
21 thought might be the case, to his e-mail account?

22 **MR. SNYDER:** They have to access the account, yes.

23 **MAGISTRATE JUDGE FOSCHIO:** Even though you're not
24 a student there any longer?

25 **MR. SNYDER:** Correct.

1 **MAGISTRATE JUDGE FOSCHIO:** Really?

2 **MR. SNYDER:** So -- so -- so in the --

3 **MAGISTRATE JUDGE FOSCHIO:** That's true of anybody
4 that has --

5 **MR. SNYDER:** I don't know, Your Honor.

6 **MR. BOLAND:** Many colleges are now allowing
7 graduates or people that are there for a couple years, I have
8 nephews who left Ohio State, they still can use that e-mail
9 and Ohio State uses it to grab them back for alumni purposes,
10 to gain money from them, to donate. They have a way to
11 contact the students so they like to let them keep those
12 e-mails.

13 **MR. SNYDER:** The point is --

14 **MAGISTRATE JUDGE FOSCHIO:** Well, they can have an
15 e-mail address without allowing access to their servers.

16 **MR. SNYDER:** The narrow point here, Your Honor, is
17 that this plaintiff, seven months after he's supposed to be in
18 compliance with the order, is asking to prevent us from --

19 **MAGISTRATE JUDGE FOSCHIO:** I know what they're
20 trying to do.

21 **MR. SNYDER:** Right. So -- so -- so if I could just
22 address the nonsense about the discrepancy --

23 **MAGISTRATE JUDGE FOSCHIO:** What I'm getting at
24 is --

25 **MR. SNYDER:** There is no discrepancy.

1 **MAGISTRATE JUDGE FOSCHIO:** Excuse me. There is a
2 Harvard account -- there is a Harvard copy in October.

3 **MR. SNYDER:** Yes.

4 **MAGISTRATE JUDGE FOSCHIO:** Then there is a Stroz
5 Friedberg copy, which apparently is made by just typing some
6 code to the Harvard server and send me a copy.

7 They now --

8 **MR. SNYDER:** Yes.

9 **MAGISTRATE JUDGE FOSCHIO:** They have one copy as of
10 April.

11 **MR. SNYDER:** Yes, Your Honor.

12 **MAGISTRATE JUDGE FOSCHIO:** How does it come to pass
13 that they're able to make a comparison with the October 2010
14 Harvard copy?

15 **MR. SNYDER:** Because Harvard gave -- Harvard gave
16 Stroz Friedberg the October copy.

17 **MAGISTRATE JUDGE FOSCHIO:** As well?

18 **MR. SNYDER:** Yes. As its -- as it -- as Mark
19 Zuckerberg had already (Inaudible) -- to request as it is
20 his -- his e-mail account.

21 And it's that comparison which Mr. Boland
22 mischaracterizes and I think Mr. Lake made the same
23 mischaracterization and to this Court before -- more than five
24 months ago --

25 **MAGISTRATE JUDGE FOSCHIO:** My understanding is that

1 when you have allegedly complete copies of original --
2 original database, such as e-mails, there shouldn't be any
3 discrepancy.

4 **MR. SNYDER:** Mr. Rose, who is one of the foremost
5 forensic computer experts in the world, describes in detail
6 what the nature of this so-called discrepancy is.

7 It's explicable, common and understood in the
8 computer forensic community to be a natural occurrence. And
9 if I -- I'm happy to explain it.

10 What -- what -- what is -- what I want to
11 underscore is that this is the -- this is the second time this
12 Court has already considered and rejected this very argument.

13 And it's based --

14 **MAGISTRATE JUDGE FOSCHIO:** Well, I want to get it
15 right, Mr. Snyder.

16 **MR. SNYDER:** -- and it's based on a false
17 characterization of Mr. Rose's declaration. So I will explain
18 it to Your Honor happily.

19 So in his -- in plaintiff's cross-motion for
20 expedited discovery filed in June, the plaintiff argued that
21 Brian Rose had admitted that an unspecified number of e-mails
22 were deleted from Zuckerberg's Harvard account.

23 As Mr. Rose explained in document number 73, more
24 than five months ago, there are no missing or deleted e-mails.

25 Stroz Friedberg initially identified 17 e-mails

1 that have nothing to do with Ceglia and nothing to do with
2 StreetFax that he -- that did not de-duplicate -- that he did
3 not de-duplicate out -- that didn't de-duplicate out when the
4 October 2010 and April 2011 accounts were completed.

5 And none of these e-mails, these 17 e-mails, have
6 anything to do with the plaintiff or StreetFax.

7 He then manually confirmed that all 17 e-mails are,
8 in fact, present in the April 2011 account, and the initial
9 apparent discrepancy was attributable not to missing or
10 deleted e-mails, as Mr. Boland knows because he must have --
11 should have read Mr. Rose's prior declaration, but rather was
12 attributable to non-substantive formatting issues in the
13 e-mail.

14 And he describes this --

15 **MAGISTRATE JUDGE FOSCHIO:** Well, then why did he
16 say in paragraph 7 of document number 47 that the results of
17 these searches did not include the purported e-mails, thus,
18 the purported e-mails are not contained in the Harvard e-mail
19 data?

20 **MR. SNYDER:** (Inaudible.)

21 **MAGISTRATE JUDGE FOSCHIO:** Is that the same problem
22 or is that something else?

23 **MR. SNYDER:** Well, Mr. Southwell can explain that.

24 **MR. SOUTHWELL:** Your Honor, that reference
25 refers to the purported e-mails in the amended

1 complaint, which are, in fact, not in the Harvard
2 account. That's what that reference is to.

3 **MR. SNYDER:** Correct.

4 **MAGISTRATE JUDGE FOSCHIO:** Oh.

5 **MR. SNYDER:** So, in other words, the make believe
6 e-mails are not in the Harvard account. And so now what
7 plaintiff is asserting in his document 258 is that two
8 e-mails, with even the most minor formatting discrepancies
9 such as extra white space in the subject line, are
10 meaningfully different and that, thus, Mr. Rose's declaration
11 constitutes "an obvious fraud" on the Court.

12 And so this preposterous and insulting argument
13 misconstrues the nature of e-mail comparison and -- and --
14 and -- and -- and distorts what Mr. Rose has told this -- this
15 Court because Mr. Boland is saying that only e-mails with
16 identical hash values are the same for purposes of e-mail
17 comparison.

18 But fact de-duplication for e-mails generally is
19 not done to a hash value comparison, not done through a hash
20 value comparison. E-mail is de-duped through a comparison of
21 fields: Sender, recipient, date, time, subject, number of
22 attachments, text and the like.

23 And in all of those critical relevant attributes,
24 the e-mails are the same.

25 **MAGISTRATE JUDGE FOSCHIO:** Even in formatting?

1 **MR. SNYDER:** For those two e-mails.

2 **MAGISTRATE JUDGE FOSCHIO:** Even between the
3 formatting in October vs. April?

4 **MR. SNYDER:** Well, no --

5 **MAGISTRATE JUDGE FOSCHIO:** Formatting.

6 **MR. SNYDER:** The reason you look at fields as
7 opposed to minor formatting discrepancies because a variety of
8 different formats in which e-mail data can be stored.

9 It's possible the differences in storage format
10 where the conversion process can create -- that differences in
11 storage format or the conversion process can create minor
12 format discrepancies between two copies of the same e-mail,
13 which is why you look to the critical attributes to basically
14 find fingerprints on the e-mail, such as same sender, same
15 recipient, same date, same time, same subject, same
16 attachments, same text. Twins. The e-mails are twins.

17 **MAGISTRATE JUDGE FOSCHIO:** And they're all there?

18 **MR. SNYDER:** So on that basis --

19 **MAGISTRATE JUDGE FOSCHIO:** And they're all there?

20 **MR. SNYDER:** Yes. On that basis he makes this
21 motion. First of all, it's premature. It should be denied on
22 that basis.

23 But I would say on this one, the Court should deny
24 it on the merits because it is based on no evidence
25 whatsoever. Zero evidence.

1 And was filed for improper purpose both to put on
2 the blog and to increase the amount of perceived pressure on
3 us and it is as meritless today as it was when Mr. Lake made
4 the same argument and this Court rejected it last -- during
5 the summer.

6 **MAGISTRATE JUDGE FOSCHIO:** Thank you.

7 **MR. BOLAND:** Your Honor, I can --

8 **MAGISTRATE JUDGE FOSCHIO:** So my -- my consultant,
9 we had a conversation about this yesterday when we reviewed
10 the papers. He now says whereas -- Mr. Healy, whereas there
11 really shouldn't be any formatting issues or differences, but
12 now that we know, which we didn't understand yesterday, that
13 it's because there were two different extractors -- Harvard --
14 in fact, that was going to be one of my main questions to
15 Mr. Boland is, you know, why don't we just go back and ask
16 Harvard to redo whatever they had and -- and in so doing we'll
17 get the mystery out of anything that's been deleted.

18 Well, now I don't think we need to because, as
19 Mr. Healy says, because the extractions were done by two
20 different parties, there exists a possibility that there will
21 be differences in the formatting of the messages, which is
22 what threw us off.

23 But now that we've got the missing piece to the
24 puzzle, which, unfortunately, is not revealed in the papers,
25 the Court understands the defendants' opposition and I'm

1 assuming Mr. Boland does, too.

2 **MR. BOLAND:** Yes, Your Honor. I was waiting for a
3 break in Mr. Snyder's monologue.

4 **MAGISTRATE JUDGE FOSCHIO:** Yes.

5 **MR. BOLAND:** I think on behalf of my client for the
6 time being I'll withdraw the motion, given our discussion
7 we've had and raise it later after some discovery where it
8 might be more relevant and --

9 **MAGISTRATE JUDGE FOSCHIO:** Thank you.

10 **MR. BOLAND:** -- and there will be more of a basis
11 for it.

12 **MAGISTRATE JUDGE FOSCHIO:** That motion would be --
13 that would be -- which motion is it?

14 **MR. BOLAND:** Number wise, I'll have to look, Your
15 Honor.

16 **THE CLERK:** 98 or -- 198?

17 **MAGISTRATE JUDGE FOSCHIO:** Is it 198?

18 **THE CLERK:** 198, gentlemen?

19 **MAGISTRATE JUDGE FOSCHIO:** We need a score keeper
20 here.

21 **THE CLERK:** 198.

22 **MAGISTRATE JUDGE FOSCHIO:** Okay, motion withdrawn
23 without prejudice, thank you.

24 **MR. BOLAND:** Yes, Your Honor.

25 **MAGISTRATE JUDGE FOSCHIO:** Let's move on to another

1 one. That's the Harvard e-mail issue. Okay, good. That was
2 a big one, actually. What's left?

3 **MR. BOLAND:** The fingerprint related motion.

4 **MAGISTRATE JUDGE FOSCHIO:** The fingerprint issue.

5 188 -- hmm? No, I haven't reserved -- I haven't made a
6 decision on the spoliation of the contract issue. We will now
7 that we've gotten into these other issues, which has been
8 helpful.

9 All right, this is -- what's left then?

10 **MR. BOLAND:** Just the spoliation regarding the
11 fingerprints --

12 **MAGISTRATE JUDGE FOSCHIO:** The fingerprints.

13 **MR. BOLAND:** -- touching of the document.

14 **MAGISTRATE JUDGE FOSCHIO:** How are fingerprints in
15 any way, shape or form relevant to the authenticity of the
16 contract?

17 **MR. BOLAND:** Two ways, Your Honor. One is --

18 **MAGISTRATE JUDGE FOSCHIO:** And why is this the
19 first time that we're hearing about fingerprinting? And why
20 wasn't that included in the testing protocol back in July?

21 **MR. BOLAND:** Well, it's included in all the
22 standards that their expert submitted and our experts adhere
23 to as well, that you always wear gloves handling documents.

24 **MAGISTRATE JUDGE FOSCHIO:** What's the point? Is it
25 that oh, gee, if we could find Mr. Zuckerberg's fingerprint on

1 page 1 as well as page 2, that would indicate that he must
2 have -- he must have initialed the interlineation regarding
3 transferring 50% of Facebook to the plaintiff?

4 **MR. BOLAND:** The defendants have made a --

5 **MAGISTRATE JUDGE FOSCHIO:** Is that -- is that the
6 bottom line here?

7 **MR. BOLAND:** That's half the bottom line. The
8 other half is the defendants have argued that there's a page 1
9 substitution going on here.

10 So if fingerprinting testing were to commence today
11 and none of Mr. Zuckerberg's fingerprints show up on page 1,
12 but one or more show up on page 2, they now have an argument,
13 "See, ladies and gentlemen of the jury, page 1's a fake."

14 But the problem is we might -- we can now not
15 recover any of Zuckerberg's fingerprints that are underneath
16 where their experts were touching.

17 **MAGISTRATE JUDGE FOSCHIO:** Have you attempted to?

18 **MR. BOLAND:** We haven't done it yet, and here's
19 why: We're going to approach the defendants to get their
20 approval because it is a type of testing that is, according to
21 the ASTM standards, it's the last test you do because you have
22 to apply a chemical to the paper to reveal these fingerprints,
23 and we don't want to -- we want the defendants to say we're
24 done testing and get everyone's assurance before we do that
25 test.

1 **MAGISTRATE JUDGE FOSCHIO:** Well, then your motion
2 is premature, if not speculative, because for all we know
3 you'll do that, then lo' and behold, Mr. Zuckerberg's
4 fingerprints will be on page 1.

5 **MR. BOLAND:** They could well -- they could well be
6 or he could not have touched it or whatever.

7 **MAGISTRATE JUDGE FOSCHIO:** And you could have a
8 home run.

9 **MR. BOLAND:** Well, I don't know if we have a home
10 run necessarily, but we -- our issue is if that testing --

11 **MAGISTRATE JUDGE FOSCHIO:** Strengthen your case.

12 **MR. BOLAND:** -- that testing shows none of his
13 fingerprints on page 1, we got a problem here because they --
14 they have contaminated it to prevent those fingerprints
15 perhaps from showing up.

16 And we'll never know. There's no way for an expert
17 to say, you know, his fingerprint's there, but their experts
18 is on top of it.

19 **MAGISTRATE JUDGE FOSCHIO:** Are we in the realm of
20 sheer speculation, counsel?

21 **MR. BOLAND:** Regarding what, Your Honor?

22 **MAGISTRATE JUDGE FOSCHIO:** Well, whether there's
23 any -- first of all, whether any spoliation occurred that's --
24 that for which the defendants should be sanctioned, number
25 one.

1 But more to the point, spoliation presumes a
2 finding of prejudice, of destruction of evidence that is
3 prejudicial to the opposing party. That is to say the
4 requesting party, you.

5 And for you to say that -- that, first of all, that
6 they should have been more careful about the possibility of
7 needing fingerprints is to me, unfortunately, heavily negated
8 by the fact that it didn't come up with Mr. Lake when we
9 carefully negotiated the protocols.

10 I don't know that the record indicates that anybody
11 in the plaintiff's team objected to the -- to the -- seriously
12 to the failing to use rubber gloves and so forth and so on
13 because of the need to take -- at least my impression, and you
14 correct me if I'm wrong, is that the first time the defendants
15 knew and I knew that there was a serious need by the plaintiff
16 to take fingerprints off these documents was when your motion
17 came in.

18 Is that fair?

19 **MR. BOLAND:** Yes, Your Honor, that's fair. I think
20 the issue here is going to be the fingerprint testing, which
21 the Court is correct, we haven't completed yet.

22 **MAGISTRATE JUDGE FOSCHIO:** Well, you can try it,
23 but as far as your motion is concerned I -- you want to
24 withdraw it?

25 **MR. BOLAND:** Yeah, we'll withdraw that one. And

1 when we do the testing, we'll go ahead with it.

2 **MAGISTRATE JUDGE FOSCHIO:** Thank you.

3 **MR. SNYDER:** Can I just --

4 **MAGISTRATE JUDGE FOSCHIO:** Motion withdrawn without
5 prejudice.

6 **MR. SNYDER:** That's fine. I would just -- I would
7 just ask Your Honor --

8 **MAGISTRATE JUDGE FOSCHIO:** Thank you, Mr. Snyder.

9 **MR. SNYDER:** Thank you, Judge, but, Judge, you
10 know, he blithely files a motion --

11 **MAGISTRATE JUDGE FOSCHIO:** He didn't get it.

12 **MR. BOLAND:** No.

13 **MR. SNYDER:** I did. But, Your Honor, on this
14 point --

15 **MAGISTRATE JUDGE FOSCHIO:** He is so intense, he
16 didn't even get that one.

17 **MR. SNYDER:** Well, I'm intense, Your Honor, because
18 I don't -- I don't view a sanctions motion --

19 **MAGISTRATE JUDGE FOSCHIO:** Frivolous, as you should
20 not --

21 **MR. SNYDER:** -- as casual.

22 **MAGISTRATE JUDGE FOSCHIO:** -- because you can't get
23 admitted *pro hac vice* if you've been sanctioned, right? You
24 don't want to be sanctioned.

25 **MR. SNYDER:** I don't view it as casual --

1 **MAGISTRATE JUDGE FOSCHIO:** I won't sanction you.
2 I'll sanction -- I don't know, I'll sanction Benjamin. No,
3 I'm only kidding.

4 **MR. SNYDER:** I don't take as casual or even
5 light-hearted Mr. Boland's filing of what really are
6 outrageous motions for sanctions and they show that he'll
7 make no argument -- he'll make any argument no matter how
8 brazen.

9 **MAGISTRATE JUDGE FOSCHIO:** They will be just as
10 outrageous if they get renewed as they are now and --

11 **MR. SNYDER:** And dishonest --

12 **MAGISTRATE JUDGE FOSCHIO:** -- you'll have a
13 chance --

14 **MR. SNYDER:** -- and there will be -- and there
15 will be --

16 **MAGISTRATE JUDGE FOSCHIO:** -- and hopefully I'll be
17 in the same good health and sitting on the bench and I'll take
18 care of business when and if I need to.

19 **MR. SNYDER:** But what I want to -- I want to make a
20 point, Your Honor, and, you know, we will seek to hold, you
21 know, Mr. Boland and prior counsel responsible --

22 **MAGISTRATE JUDGE FOSCHIO:** I'll be happy to deny it
23 without prejudice. Does that makes you feel better?

24 **MR. SNYDER:** But I just want to address one
25 comment. Your Honor said there's a serious need by plaintiff

1 to take fingerprints off the document.

2 There is no such serious need.

3 **MAGISTRATE JUDGE FOSCHIO:** No, I said -- I said
4 it's the first time I heard there was a serious need.

5 **MR. SNYDER:** Right, but there isn't a serious need.
6 The reason he's raised this point and, of course, just for
7 Your Honor to be aware, his own expert touched the document
8 approximately eight times in a single day. His own expert
9 touched the document with his own hands eight different times
10 on a single day.

11 And his own -- and Mr. Argentieri also touched the
12 document with his bare hands. So this is not a good faith
13 motion filed actually to take -- because they want to take
14 fingerprints off a document.

15 The reason they filed this is because Mark
16 Zuckerberg's fingerprints were never on and could never be on
17 page 1 of this document because it was manufactured by this
18 plaintiff fewer than two years ago. So that's why they filed
19 this motion for the --

20 **MAGISTRATE JUDGE FOSCHIO:** But that's their point.

21 **MR. SNYDER:** -- for the improper purpose --

22 **MAGISTRATE JUDGE FOSCHIO:** Your experts' inks
23 analysis is wrong. The fingerprint speaks for itself and, you
24 know, write a check for \$25 billion, it's very simple.

25 **MR. SNYDER:** Right. But my point is --

1 **MAGISTRATE JUDGE FOSCHIO:** Or write him into the
2 IPO, whatever.

3 **MR. SNYDER:** I just want to preserve -- I just want
4 to preserve for the record our point and make it clear that
5 this was filed not only with no basis and without foundation
6 in violation of Rule 11, but for the improper purpose, the
7 improper purpose of -- of making accusations in the record to
8 deal with the fact that as a physical -- it's a physical
9 impossibility that my client's fingerprints ever could have
10 been on page 1.

11 And, of course --

12 **MAGISTRATE JUDGE FOSCHIO:** Well, that begs the
13 question. I mean, I accept you as learned and able counsel
14 representing to the Court that these experts have already
15 found another smoking gun in the form of the ink analysis.

16 **MR. SNYDER:** Yes.

17 **MAGISTRATE JUDGE FOSCHIO:** So be it. But I don't
18 know that as a fact and it's not on the -- it's not --

19 **MR. SNYDER:** Not yet, Your Honor.

20 **MAGISTRATE JUDGE FOSCHIO:** -- not yet formally part
21 of the record.

22 **MR. SNYDER:** Thank you.

23 **MAGISTRATE JUDGE FOSCHIO:** And -- but I asked him a
24 fair question, and he gave me a decent answer, which is if the
25 fingerprints were there, it would tend to rebut the argument

1 that the first page was substituted.

2 **MR. SNYDER:** But, Your Honor, you think it's a
3 coincidence that when Ms. Aycok, Mr. Southwell, Mr. Benjamin,
4 Mr. Lake, Mr. Flynn and this Court spent hours developing the
5 protocol under which the document would be tested, with their
6 team of experts, do you think it's a coincidence that they
7 didn't ask for fingerprint testing? It's not.

8 **MAGISTRATE JUDGE FOSCHIO:** Look, he's withdrawn
9 without prejudice. You acquiesced.

10 **MR. SNYDER:** Right.

11 **MAGISTRATE JUDGE FOSCHIO:** If I had to rule, I
12 would have denied it and --

13 **MR. SNYDER:** Thank you.

14 **MAGISTRATE JUDGE FOSCHIO:** He knows what his burden
15 is. He's not a -- he's a pretty sharp fellow.

16 Now, I'm going to just reiterate that we have one
17 more motion, which is the spoliation of the contract. That's
18 the yellowing issue, so to speak.

19 **MR. BOLAND:** Yes, Your Honor.

20 **MAGISTRATE JUDGE FOSCHIO:** Oh, is there a motion
21 about prohibiting reliance on e-mail exchanges?

22 **MR. SNYDER:** Yes, Your Honor, he also has filed,
23 amazingly enough, document 229, which seeks to prohibit
24 defendants from disputing the authenticity of the alleged
25 e-mails described in the first amended complaint, which, of

1 course, was one of the primary purposes of the expedited
2 discovery order, for us to take discovery to that issue.

3 **MAGISTRATE JUDGE FOSCHIO:** Oh, prohibiting
4 defendants from reliance on arguments that e-mail exchanges
5 between Ceglia and Zuckerberg are frauds.

6 Oh, yes, that's the -- the -- that's the Grant
7 analysis of the e-mails on the floppy disks as having no
8 indicia of fraud, right.

9 Okay. Well, the argument on the other side, of
10 course, is that he -- the defendant has said several times in
11 the course of this afternoon's proceedings is that -- Mr.
12 Grant has never actually examined the e-mails, and unless you
13 look at the e-mails you can't really be sure whether or not
14 they're fabricated.

15 I think that's the gist of your argument, isn't it,
16 Mr. Snyder?

17 **MR. SNYDER:** Yes. In other words, the Grant
18 declaration, which is document 226, doesn't establish the
19 authenticity of the fake e-mails.

20 In fact, he doesn't even say that the two floppy
21 disks he analyzed have anything to do with the purported
22 e-mails. Rather, he says he conducted some tests on the disks
23 themselves, which he says in conclusory fashion, none of which
24 confirm plaintiff's fraud.

25 And in connection with our motion to dismiss, we're

1 going to submit dispositive forensic evidence confirming that
2 the electronic documents containing the alleged e-mails, which
3 I've called the cut-and-paste jobs, actually contain
4 significant metadata anomalies indicative of backdating and
5 fraud --

6 **MAGISTRATE JUDGE FOSCHIO:** Unless Mr. Grant looked
7 at them, he wouldn't know the answer to -- he wouldn't know
8 whether you were right or wrong.

9 **MR. SNYDER:** Correct. And -- and so --

10 **MAGISTRATE JUDGE FOSCHIO:** Why didn't he look at
11 them?

12 **MR. BOLAND:** Look at what specifically, Your
13 Honor?

14 **MAGISTRATE JUDGE FOSCHIO:** Look at the e-mails that
15 we're talking about.

16 **MR. BOLAND:** He looked at every single one of the
17 e-mail files and all the metadata associated with those files
18 to determine if, for example, the dates associated with when
19 those files were created were out of synch --

20 **MAGISTRATE JUDGE FOSCHIO:** He did have access to
21 the metadata?

22 **MR. BOLAND:** Everything. He looked at everything.
23 He didn't -- I don't understand -- when you're saying "he
24 didn't look at the e-mails," I'm not -- I'm not clear on your
25 question.

1 He looked at all the --

2 **MAGISTRATE JUDGE FOSCHIO:** Well, I thought he
3 looked at floppy disk copies of the e-mails, but not the
4 originals?

5 **MR. BOLAND:** He -- he -- he made the images --

6 **MAGISTRATE JUDGE FOSCHIO:** Maybe I don't understand
7 the defendants' position here well enough.

8 **MR. SNYDER:** Yes, Your Honor. The --

9 **MAGISTRATE JUDGE FOSCHIO:** Let's just tee this up.
10 What exactly are you saying in opposition here?

11 **MR. SNYDER:** What I'm saying is, his declaration --
12 first of all, I'm saying this is wildly premature and should
13 be denied on that basis alone since -- since we -- we don't
14 even have all the evidence yet to present to the Court on this
15 issue.

16 But his declaration in paragraph 10 says he
17 performed initial view of the diskettes and analyzed disks and
18 talks about, first of all, there are no e-mail files. There
19 are only floppy disks containing documents, Word documents.

20 But he says that he examined disks, and date and
21 location of files on disks. And what I would -- so -- and
22 it's very opaque and it doesn't say that he reviewed metadata
23 because he doesn't address metadata anomalies that are
24 obvious. It would be obvious to any forensic analyst looking
25 at these files that are indicative of backdating and forgery.

1 It's -- it's -- it's in paragraph 11 --

2 **MAGISTRATE JUDGE FOSCHIO:** Paragraph 11 of his --

3 **MR. SNYDER:** Yeah, it's very vague, conclusory
4 and --

5 **MAGISTRATE JUDGE FOSCHIO:** Do you have any experts
6 that proffer to the opposite or --

7 **MR. SNYDER:** Well, we are going to -- this is,
8 again, for the purpose of Mr. Boland's exercise here.

9 **MAGISTRATE JUDGE FOSCHIO:** Yeah, I know.

10 **MR. SNYDER:** So I respectfully submit, Your Honor,
11 this plaintiff comes to this Court --

12 **MAGISTRATE JUDGE FOSCHIO:** Your attack on the
13 motion is limited to an attack on -- on Grant's analysis?

14 **MR. SNYDER:** Well, no. My attack on the motion is
15 that this is an end run around the expedited discovery order
16 issued by this Court that the fraudulent nature of the
17 purported e-mails in the amended complaint --

18 **MAGISTRATE JUDGE FOSCHIO:** I understand that. I'm
19 just trying to tee it up. You're saying, "Look, Judge, he may
20 have an argument as far as it goes based on what Mr. Grant
21 says. But we will have an argument in opposition thereto,
22 therefore, which we should not be required to disclose at this
23 time --

24 **MR. SNYDER:** Correct.

25 **MAGISTRATE JUDGE FOSCHIO:** -- and it is premature

1 for you to rule in this way on a critical issue of expert
2 opinion regarding these allegedly fabricated e-mails," which
3 are -- are -- are pretty -- what shall we say? Colorful and
4 interesting to say the least --

5 **MR. SNYDER:** Right.

6 **MAGISTRATE JUDGE FOSCHIO:** -- because if they're
7 true, they -- if they're true, they most certainly resonate
8 with the plaintiff's theory that there was a contract.

9 **MR. SNYDER:** Right. Mr. Zuckerberg obviously --

10 **MAGISTRATE JUDGE FOSCHIO:** If not a copyright
11 violation.

12 **MR. SNYDER:** Right. Well, Mr. Zuckerberg obviously
13 has sworn to this Court that he never authored any of those
14 fake e-mails.

15 Those e-mails, according to an expert we submitted,
16 were not written by Mr. Zuckerberg in his voice, in his -- the
17 way that he writes --

18 **MAGISTRATE JUDGE FOSCHIO:** But it's not --

19 **MR. SNYDER:** -- and we will demonstrate
20 forensically that when we file our motion to dismiss --

21 **MAGISTRATE JUDGE FOSCHIO:** I have to take your word
22 for it for purposes of this motion though?

23 **MR. SNYDER:** No, for purposes of this motion I
24 think Your Honor can summarily deny this as a premature and
25 improper procedurally motion to bar us from presenting the

1 very evidence to the Court that the expedited discovery order
2 directs us to -- to produce.

3 **MAGISTRATE JUDGE FOSCHIO:** These e-mails really --
4 well, Mr. Healy actually points out to me that one could agree
5 with everything -- well, not everything Mr. Grant says per se,
6 but still not necessarily conclude that the document that he
7 was analyzing was not fabricated.

8 **MR. BOLAND:** Correct. I mean, there's an
9 opportunity for an expert to question whatever Mr. Grant says.

10 **MAGISTRATE JUDGE FOSCHIO:** No, no. Mr. Grant --
11 Mr. Grant is arguably correct. But that begs the question of
12 whether, despite the correctness of the -- of the indicators
13 that he found that were consistent with a timely document
14 being created, it doesn't tell us who actually created the
15 document.

16 It could still be a fabrication.

17 **MR. BOLAND:** Of course.

18 **MAGISTRATE JUDGE FOSCHIO:** That's -- well, thus,
19 your -- I think, unless I'm missing something, not only is
20 your motion premature, but it lacks a sufficient colorable
21 basis to apply a sanction based on spoliation.

22 **MR. BOLAND:** No, this -- this motion --

23 **MAGISTRATE JUDGE FOSCHIO:** Excuse me, not
24 spoliation. It -- it -- it -- it -- it -- it does not support
25 a prohibition on their use of this -- of this -- of the -- of

1 whatever they're going to use to show that these e-mails were,
2 notwithstanding Mr. Grant's analysis, fabricated.

3 **MR. BOLAND:** The short summary, Your Honor, is this
4 motion, along with the other ones --

5 **MAGISTRATE JUDGE FOSCHIO:** Is that basically --
6 excuse me, is that -- I just want to make sure I give
7 everybody a fair shake here.

8 Is that correct? Have I stated the essence of the
9 defendants' position?

10 **MR. SNYDER:** Yes, Your Honor, which I think
11 confirms that the purpose of all these motions which he so
12 happily -- no, I think the purpose was to get discovery. And
13 on that point I just want to note something for the record.

14 Again, this is -- there's nothing garden variety
15 about this. This is -- we will demonstrate to the Court when
16 we move to dismiss this is not a case of dueling experts where
17 reasonable minds can differ.

18 And I think that the purpose of these motions is to
19 try to create that aura about the case and then he'll withdraw
20 the motion and say, "I didn't really mean to file this motion,
21 I just wanted" -- it's unclear why he filed. It's unclear
22 whether -- let me just say this: Despite the fact that he's
23 withdrawing motion after motion, the fact is this is not a
24 case of dueling experts and I don't want by my silence to
25 acquiesce to that characterization.

1 **MAGISTRATE JUDGE FOSCHIO:** Okay. Well, the --
2 unless you have something further to say about it, I -- I feel
3 obliged to, you know, to deny the motion without prejudice to
4 renewal.

5 **MR. BOLAND:** Very well, Your Honor. I just -- the
6 philosophical distinction here is this: I don't think it's
7 appropriate for the defendants in a motion to dismiss, which
8 is coming, to ask this Court to decide whether to dismiss this
9 case on fraud when the Court will be determining that between
10 dueling experts.

11 They started all of this by saying there would be
12 no -- there would be universal opinions on our side, and
13 they've now crept towards, well, we're gonna have an expert,
14 but you're gonna have an expert and they're putting you in the
15 position of a jury at that point as opposed to just deciding a
16 motion that's universally proven.

17 **MAGISTRATE JUDGE FOSCHIO:** Well, no, I can assure
18 you they will not. Unless they elect a bench trial before me
19 or both of you do, that isn't going to happen.

20 I said unless the -- unless they elect to proceed
21 on a bench trial before myself, that is not going to happen.
22 I'm not going to get in the way of a jury.

23 I started out on that point and I intend to stick
24 with it.

25 So that motion is denied --

1 **MR. BOLAND:** Very well.

2 **MAGISTRATE JUDGE FOSCHIO:** -- without prejudice.
3 Add it to your list.

4 Now, I just want to take a very brief break before
5 I give you a ruling on the -- the spoliation of the contract,
6 and that's because my -- I had a couple of cases checked about
7 my concept of whether discoloration of a document constitutes
8 spoliation.

9 And I don't want to say anything on the record
10 until I just take five, ten minutes with my law clerk and I'll
11 be right back. And then we will complete, I think, what we're
12 gonna -- and that will be the last ruling for the day then,
13 correct?

14 **MR. BOLAND:** Yes, Your Honor.

15 **MAGISTRATE JUDGE FOSCHIO:** Okay. So we'll just
16 take a ten minute break.

17 **THE CLERK:** All rise.

18 (WHEREUPON, there was a pause in the proceeding.)

19 **MAGISTRATE JUDGE FOSCHIO:** I came in early because
20 I got my answer early.

21 **MR. SNYDER:** It's so comfortable in the attorneys
22 lounge.

23 **MAGISTRATE JUDGE FOSCHIO:** Isn't that nice? Did
24 you get to the attorneys lounge downstairs?

25 **MR. SNYDER:** Yeah, they have cocktails in there,

1 it's really nice.

2 **MAGISTRATE JUDGE FOSCHIO:** Really? Yeah, how come
3 we weren't invited? Okay.

4 **THE CLERK:** Ready, Judge? Back on the record. Oral
5 argument, Ceglia vs. Zuckerberg and Facebook.

6 **MAGISTRATE JUDGE FOSCHIO:** I consulted a couple of
7 cases with my law clerk's assistance, which tends in my
8 judgment to corroborate my instinct, which is that
9 discoloration of -- of documents allegedly spoliated in a case
10 does not constitute spoliation as long as the underlying
11 information that is contained in the document or the item,
12 whether it's a disk, computer diskette or a -- a -- an actual
13 document such as a contract, is discernible and can be read.

14 And -- or for that matter, analyzed by an expert.
15 The discoloration in itself is not a form of spoliation.

16 So that's one point.

17 And those cases are *Malinski*, M-A-L-I-N-S-K-I vs.
18 something called *Documented Vehicle/Drivers Systems, Inc.*, 66
19 F -- Fed. App'x 216, 2003 WL 21243907, First Circuit, Rhode
20 Island.

21 And the other is a magistrate judge, which, of
22 course, we have very -- find very persuasive, *U.S. vs. Morris*,
23 M-O-R-R-I-S, this is a little too loud for me -- just tweak it
24 back when you get a chance, not right now -- 2006 WL 2054585.
25 2054585. Eastern District of Kentucky, July the 20th, 2006.

1 Similar reasoning, in particular footnote number 1.

2 For that reason and also the reasons put forth in
3 the defendants' papers and based on the very thorough and
4 helpful oral argument, the motion is also -- this particular
5 motion, the 213, Sandra?

6 **THE CLERK:** Yes, Judge.

7 **MAGISTRATE JUDGE FOSCHIO:** Is denied.

8 **MR. BOLAND:** Your Honor, may I make one comment
9 going forward?

10 **MAGISTRATE JUDGE FOSCHIO:** I'm just trying to
11 think of whether this one is denied with prejudice or without.
12 Well, I would say because we've got these technical issues,
13 that I would probably say without prejudice, but -- yeah?

14 **MR. BOLAND:** Your Honor, in light of the ruling
15 and the discussion, one other issue that occurred to me about
16 this for the future is that now that the document is in a
17 yellowed condition, it disables the plaintiff from defending a
18 claim that on the date it was received by the experts, it was
19 already somehow improperly discolored because the only images
20 that are left of how the document was the day they received it
21 are theirs and their treatment of it has now made it yellow
22 and we can't really rewind it back to whatever color we would
23 argue it really was that day compared to what they claim it
24 was.

25 So the further yellowing they did actually is

1 harming us in that regard that we can't go back.

2 **MAGISTRATE JUDGE FOSCHIO:** That's not true though.
3 They took a mirror image of it when it came -- when it came
4 out of the Argentieri's mail pouch.

5 **MR. BOLAND:** They scanned it.

6 **MAGISTRATE JUDGE FOSCHIO:** Scanned it?

7 **MR. SNYDER:** We took a high resolution digital
8 photograph image, which captured perfectly and accurately the
9 physical condition of the document when the -- Mr. Argentieri
10 removed it from his envelope.

11 **MAGISTRATE JUDGE FOSCHIO:** Similar to -- what's the
12 Russian man's name? The fellow that made the high resolution
13 photo in January?

14 **MR. SNYDER:** Aginsky, yes, Your Honor.

15 **MAGISTRATE JUDGE FOSCHIO:** Aginsky.

16 **MR. SNYDER:** Aginsky.

17 **MR. BOLAND:** Mm-hmm.

18 **MR. SNYDER:** Yeah, same technology, yes, Your
19 Honor.

20 **MAGISTRATE JUDGE FOSCHIO:** So if you have that --

21 **MR. BOLAND:** We have Aginsky's image. And then
22 they have the one the day they got it, and they're claiming
23 there's a distinction between the two.

24 **MAGISTRATE JUDGE FOSCHIO:** And why -- you're saying
25 you don't have a copy of that, is that your problem? No.

1 **MR. BOLAND:** No, I have copies of both of those.
2 But now that the document has irretrievably been made
3 yellowed --

4 **MAGISTRATE JUDGE FOSCHIO:** Well that -- I'm not
5 sure that's true. Does the defendant concede that,
6 Mr. Snyder?

7 **MR. SNYDER:** Concede?

8 **MAGISTRATE JUDGE FOSCHIO:** That the document has
9 become yellowed in the possession of the -- while in the
10 possession of the defendant?

11 **MR. SNYDER:** Absolutely not. There's no evidence
12 of that, and if Mr. Boland attempts to present some down the
13 road, we'll respond to it. He's, I think, trying to bait us
14 into giving him more discovery.

15 But plaintiff is the criminal who altered the
16 document. We did not alter this document --

17 **MAGISTRATE JUDGE FOSCHIO:** I -- I --

18 **MR. SNYDER:** -- in any way.

19 **MAGISTRATE JUDGE FOSCHIO:** Thank you. That's what
20 I thought his position was. He doesn't concede that it's
21 actually yellowed.

22 **MR. BOLAND:** Very well.

23 **MAGISTRATE JUDGE FOSCHIO:** There -- there -- I
24 don't quarrel with what you've showed on the screen, but they
25 believe that that's not necessarily a fact.

1 **MR. BOLAND:** Very well.

2 **MAGISTRATE JUDGE FOSCHIO:** I don't know how one can
3 explain what appeared to be on -- to me on the screen that it
4 was -- which seems to have a contrast along the lines of what
5 you attribute to it, but the defendants say otherwise and I'm
6 not going to make a ruling about that.

7 **MR. BOLAND:** Well, and is it -- I kind of
8 interrupted you and I apologize. Is it your ruling without
9 prejudice or with prejudice?

10 **MAGISTRATE JUDGE FOSCHIO:** Without.

11 **MR. BOLAND:** Very well. And we'll raise it again.

12 **MAGISTRATE JUDGE FOSCHIO:** All right. Well, I want
13 to compliment both sides on excellent preparation, extremely
14 helpful papers, good -- very professionally done and your
15 perseverance this afternoon, four hours slugging it out
16 with -- with all of the questioning that I peppered you both
17 with, both sides.

18 And I just want to tell you that the Court
19 appreciates good lawyering regardless of the differences of
20 opinion and the zealousness with which these arguments have
21 been put forth.

22 So -- now, where do we go from here is what --
23 before we adjourn and for the holidays here?

24 **MR. SNYDER:** Yes, Your Honor. We -- we continue to
25 wait, as we have been waiting since August, for plaintiff to

1 be in compliance.

2 Once he is in compliance, we --

3 **MAGISTRATE JUDGE FOSCHIO:** Please sit down.

4 Otherwise, you're going to break your neck here --

5 **MR. SNYDER:** Yeah. Once he's in compliance --

6 **MAGISTRATE JUDGE FOSCHIO:** -- bending over.

7 **MR. SNYDER:** -- once he's in compliance, we will
8 conform and comply happily with the Court's July 1 order and
9 provide the plaintiff with the Harvard e-mails and --

10 **MAGISTRATE JUDGE FOSCHIO:** When do you think that
11 might be as a practical matter?

12 **MR. SNYDER:** Well, it's hard to know because it's
13 my belief that this plaintiff is currently obstructing our
14 effort to obtain access to his Microsoft e-mail account by
15 providing incomplete --

16 **MAGISTRATE JUDGE FOSCHIO:** So I may see another
17 motion?

18 **MR. SNYDER:** I hope not, but he -- he seemed to
19 not -- he seems to not be able to fill out the form that
20 Microsoft says is pretty --

21 **MAGISTRATE JUDGE FOSCHIO:** Let's say hypothetically
22 the problem goes away --

23 **MR. SNYDER:** Right.

24 **MAGISTRATE JUDGE FOSCHIO:** -- or I get another
25 motion in here within the next week or ten days and I put my

1 usual scheduling order on and maybe don't need oral argument
2 on it and I issue a ruling, say, by the first part of January.

3 Then what? Would it be *a propos* for the Court to
4 schedule a full Rule 16(b) conference to --

5 **MR. SNYDER:** No, Your Honor.

6 **MAGISTRATE JUDGE FOSCHIO:** -- to put a full
7 scheduling order on so --

8 **MR. SNYDER:** No, we addressed --

9 **MAGISTRATE JUDGE FOSCHIO:** -- excuse me, let me
10 finish. So we can launch paper discovery and start scheduling
11 depositions in the usual format?

12 **MR. SNYDER:** No. Your Honor asked me that question
13 at the last hearing and my response was no, because the
14 expedited discovery order contemplates as the next step our
15 submitting to the Court expert reports and we will do that
16 together with a motion to dismiss.

17 And it's our position that under -- and under the
18 order it says defendant shall complete their examination and
19 provide to the Court and plaintiff reports document in the
20 findings of our examination 30 days from plaintiff's
21 compliance with the order.

22 So we will comply with the order. That's paragraph
23 9 of the August 18th order, and file no later than 30 days
24 and -- and hopefully earlier than 30 days --

25 **MAGISTRATE JUDGE FOSCHIO:** Does the order -- did my

1 order include a anticipated motion to dismiss on various
2 grounds?

3 **MR. SNYDER:** It did not, Your Honor.

4 **MAGISTRATE JUDGE FOSCHIO:** Did not.

5 **MR. SNYDER:** But we will be moving to dismiss. The
6 Rule 16 conference is presently stayed and -- I believe.

7 **MAGISTRATE JUDGE FOSCHIO:** Did I formally do that?

8 **MR. BOLAND:** Yes.

9 **MAGISTRATE JUDGE FOSCHIO:** I did?

10 **MR. SNYDER:** Yes, Your Honor.

11 **MAGISTRATE JUDGE FOSCHIO:** Oh.

12 **MR. SNYDER:** And we believe that based on the
13 substantial showing in all of these motions, together with the
14 showing we made before, that the next and appropriate step --

15 **MAGISTRATE JUDGE FOSCHIO:** All right.

16 **MR. SNYDER:** -- is to consider our motion to
17 dismiss, which will be --

18 **MAGISTRATE JUDGE FOSCHIO:** But you see my point?
19 The order does not technically, as you put it, contemplate a
20 dismissal motion.

21 **MR. SNYDER:** It doesn't preclude it, but this -- I
22 would respectfully submit that the stay of the Rule 16
23 conference recognizes that given the serious showing that
24 we've made of fraud at that early date --

25 **MAGISTRATE JUDGE FOSCHIO:** Substantial.

1 **MR. SNYDER:** -- substantial showing of fraud, even
2 at that early date --

3 **MAGISTRATE JUDGE FOSCHIO:** Right.

4 **MR. SNYDER:** -- before we found everything else
5 that we found --

6 **MAGISTRATE JUDGE FOSCHIO:** Okay.

7 **MR. SNYDER:** -- reflects the Court's awareness that
8 Rule 16 procedures would not be appropriate at that time.

9 I would respectfully submit that given the evidence
10 we found of fraud --

11 **MAGISTRATE JUDGE FOSCHIO:** What's the harm in it?

12 **MR. SNYDER:** I do not believe that a plaintiff, who
13 is committing a massive fraud on this Court and on my clients,
14 and then for six months spoliated evidence, tampered with
15 documents, should be permitted to conduct discovery.

16 I think this Court's inherent power is broad
17 enough --

18 **MAGISTRATE JUDGE FOSCHIO:** Well, I know that's your
19 argument. But you know there is another point of view, shall
20 we say?

21 **MR. SNYDER:** I don't think a plaintiff who has
22 committed a fraud of this nature, based on the showing that we
23 will make 30 days following plaintiff's compliance with the
24 order, entitles him to any discovery because it mandates, in
25 our judgment, dismissal of this case.

1 Not only for the serious fraud that underlies this
2 case, but for the --

3 **MAGISTRATE JUDGE FOSCHIO:** Well, I'll tell you
4 this: If you think that's the case, I would appreciate some,
5 you know, binding Second Circuit authority to that effect.

6 **MR. SNYDER:** Sure.

7 **MAGISTRATE JUDGE FOSCHIO:** I mean --

8 **MR. SNYDER:** I think --

9 **MAGISTRATE JUDGE FOSCHIO:** -- his contemplation
10 based on the colloquies we've just had here over the past four
11 hours is that the Court may well grant him some limited period
12 of time within which, for example, take experts, your experts'
13 depositions.

14 **MR. SNYDER:** Well, Your Honor, we respectfully --

15 **MAGISTRATE JUDGE FOSCHIO:** Just as would be the
16 case if there was a normal Rule 16(b) scheduling order in
17 place.

18 **MR. SNYDER:** Well, I would respond in two ways.
19 One, Your Honor, that the -- the issuance of the expedited
20 discovery order in the first place, I think, recognizes that
21 this is an extraordinary case requiring extraordinary
22 procedures.

23 And, therefore, this Court has the inherent power
24 consistent with that to -- to manage the case in accordance
25 with those extraordinary circumstances .

1 So that when we file our motion to dismiss, we will
2 provide the Court at that time with authority and arguments
3 for why there should be no further proceedings beyond the
4 motion to dismiss.

5 And the motion to dismiss will not only be based on
6 the fraud that underlies this case, the manufactured
7 work-for-hire agreement and the manufactured e-mails, but also
8 for case-ending sanctions for spoliation and for the tampering
9 with the work-for-hire agreement between January and June of
10 2011, which we believe under Second Circuit authority gives
11 this Court ample basis to --

12 **MAGISTRATE JUDGE FOSCHIO:** Of course.

13 **MR. SNYDER:** -- to dismiss for that reason as well.

14 **MAGISTRATE JUDGE FOSCHIO:** That -- that -- but the
15 spoliation is the baking of the -- the cooking of the
16 document.

17 **MR. SNYDER:** And the destruction of the remote
18 access devices which this plaintiff --

19 **MAGISTRATE JUDGE FOSCHIO:** Oh.

20 **MR. SNYDER:** -- having come back from hiding in
21 Ireland and looked for --

22 **MAGISTRATE JUDGE FOSCHIO:** Still can't find it.

23 **MR. SNYDER:** -- the dog ate it, it's gone .

24 So that is, just to put a fine point on it, that
25 is the destruction of --

1 **MAGISTRATE JUDGE FOSCHIO:** Including the Seagate
2 drive?

3 **MR. SNYDER:** Yes, Your Honor. That is the
4 destruction --

5 **MAGISTRATE JUDGE FOSCHIO:** Must have been a big
6 dog.

7 **MR. SNYDER:** It must have been, maybe the whale,
8 itself, Your Honor.

9 And, again --

10 **MAGISTRATE JUDGE FOSCHIO:** That big?

11 **MR. SNYDER:** -- again, this is the equivalent of --
12 of --

13 **MAGISTRATE JUDGE FOSCHIO:** It did not materialize?

14 **MR. SNYDER:** Didn't materialize. And, of course,
15 this was the -- the remote storage device that contained files
16 called "Zuckerberg contract pages 1 and 2.tif." Lost,
17 destroyed forever.

18 And so we think this raises questions of serious
19 evidence tampering and destruction, which in and of itself
20 before you get to the litigation fraud underlying this case
21 mandates dismissal of this case.

22 And on those circumstances, giving the plaintiff
23 discovery --

24 **MAGISTRATE JUDGE FOSCHIO:** You don't want to depose
25 Mr. -- Mr. Ceglia about anything?

1 **MR. SNYDER:** I have -- he has made enough
2 admissions in -- and as -- in his conduct and the forensic
3 analysis is sufficient.

4 You don't need a confession when you have -- when
5 you have the murder knife, the fingerprints on the murder
6 knife and a videotape and eyewitnesses. You don't need a
7 confession.

8 I don't need Mr. Ceglia to confess to me to know
9 that he is a criminal who is committing a fraud on this Court.

10 **MAGISTRATE JUDGE FOSCHIO:** Okay, I see. I
11 understand. But it wouldn't come as a shock if -- if --
12 and -- from your analysis of the -- of the applicable law, is
13 it -- is it -- it would be clearly erroneous for the
14 magistrate judge in this circumstance to permit limited
15 discovery of, say, by way of depositions of experts and so
16 forth?

17 **MR. SNYDER:** I'm not suggesting that that would
18 necessarily be abuse of discretion.

19 What I am suggesting is that in my experience in
20 the federal courts throughout this country when confronted
21 with this kind of record, and I've -- I don't know if I've
22 ever seen a record this replete with misconduct and fraud, but
23 with a record of this kind it would be unusual, I think, to
24 reward the wrongdoer, the plaintiff here, with -- with -- with
25 discovery and --

1 **MAGISTRATE JUDGE FOSCHIO:** Well, it's not a matter
2 of rewarding. It's a matter of fairness.

3 **MR. SNYDER:** Well, I think this plaintiff has been
4 given all of the due process and more six months -- six months
5 later --

6 **MAGISTRATE JUDGE FOSCHIO:** Hasn't had a front -- a
7 chance to really confront his slash -- his "accusers," if you
8 will.

9 **MR. SNYDER:** I think he has waived the right to
10 take a single deposition in this case based alone on his
11 misconduct since July 1st -- actually, I would say since
12 January 1st.

13 In other words, his misconduct during the course of
14 this litigation in and of itself, separate and apart from the
15 fraud that underlies the case, in my judgment, makes this an
16 easy case, almost a paradigmatic case for dismissal based on
17 the Court's inherent power, based on Rule 37 and substantial
18 Second Circuit case law.

19 And as to that substantial Second Circuit case law,
20 as to that, I believe that this Court would not only be well
21 within its discretion, but would be four square within settled
22 authority to dismiss the case for the fraud that has occurred
23 since the case has begun, and no question that the
24 Second Circuit would summarily affirm that because it is
25 difficult to imagine spoliation more material and prejudicial

1 than the two acts of spoliation that are most prominent in
2 this case.

3 One, the baking of the contract between January and
4 June of 2011 as to which his best defense is that maybe the
5 setting on the camera was different, which we'll be able to
6 blow out of the water.

7 And the second act of spoliation is the
8 disappearance of critical remote storage devices containing
9 the -- the dispositive document in the case.

10 And that has -- and --

11 **MAGISTRATE JUDGE FOSCHIO:** You're not going to make
12 a separate motion directed to these -- these -- the
13 disappearance of the flash/hard drives?

14 **MR. SNYDER:** That will be in support of our motion
15 to dismiss.

16 **MAGISTRATE JUDGE FOSCHIO:** I see. Not a separate
17 spoliation motion?

18 **MR. SNYDER:** It will be a motion to dismiss based
19 on the --

20 **MAGISTRATE JUDGE FOSCHIO:** Spoliation.

21 **MR. SNYDER:** -- spoliation. And the Court, we
22 believe, should not only dismiss the case, but should issue
23 monetary sanctions as well as -- as -- as a secondary --

24 **MAGISTRATE JUDGE FOSCHIO:** Okay.

25 **MR. SNYDER:** -- sanction.

1 **MAGISTRATE JUDGE FOSCHIO:** Well, if you're going
2 to -- it's up to you, I'm not telling you how to handle
3 this --

4 **MR. SNYDER:** Sure.

5 **MAGISTRATE JUDGE FOSCHIO:** -- I just want to talk
6 about it in advance so we know, I know where we're going
7 because if I don't see a motion somewhere along the way here,
8 I will feel obliged to schedule a Rule 16 to get the case on
9 track.

10 **MR. SNYDER:** But, Your Honor, the time delay here
11 should not be held against us.

12 **MAGISTRATE JUDGE FOSCHIO:** I didn't say anything
13 about holding it against anybody. I just said if I don't see
14 a motion somewhere along the way, I'll be obliged to put the
15 case on track --

16 **MR. SNYDER:** Again --

17 **MAGISTRATE JUDGE FOSCHIO:** -- for a regular 16(b)
18 conference.

19 **MR. SNYDER:** Right. We will file the motion. We
20 had hoped to file the motion in September and we will file the
21 motion when the plaintiff --

22 **MAGISTRATE JUDGE FOSCHIO:** In fact, that reminds
23 me. Sandra, didn't Judge Arcara designate this case for ADR?

24 **THE CLERK:** (Inaudible).

25 **MR. SNYDER:** We addressed that the last conference,

1 Your Honor.

2 **MAGISTRATE JUDGE FOSCHIO:** I can't remember what we
3 said, but I just want to remind everybody that it is --

4 **MR. SNYDER:** We said that we're not interested in
5 any dispute resolution procedure.

6 **MAGISTRATE JUDGE FOSCHIO:** I know, I know, but I
7 have to go by the book because as Mr. Flynn will tell you,
8 Judge Skretny is very, very jealous about the program --

9 **MR. SNYDER:** Yes.

10 **MAGISTRATE JUDGE FOSCHIO:** -- and requires the
11 magistrate judges to go by the book, which means that
12 technically, unless you make a motion to opt-out of ADR, to be
13 excused from it, to District Judge Arcara, not me, I will have
14 to at some point when I put a Rule 16 order in place designate
15 the case for ADR.

16 **MR. SNYDER:** Well, I think -- I thought we had made
17 that motion last time.

18 **MAGISTRATE JUDGE FOSCHIO:** Well, I don't know that
19 you have.

20 **MR. SNYDER:** Well, in any event it's our
21 position --

22 **MAGISTRATE JUDGE FOSCHIO:** I'm not trying to
23 discombobulate you or ruin your trip home or something. I
24 just while you're all here want to take the opportunity
25 besides complimenting everybody on a good job, excellent job,

1 remind everybody about my concerns about keeping the case on
2 track and fairness considerations, the discovery issues and so
3 forth.

4 So I have said that. That's all I need to say.

5 And as far as this preclusion of the plaintiff from
6 taking even expert discovery, you can either wait for him to
7 make the request in opposition to your motion, or you can
8 include it in your motion so that he has something to respond
9 to if that's going to continue to be your position.

10 **MR. SNYDER:** Thank you, Judge. Although, as I
11 said, I believe that -- that this Court will have substantial
12 basis to dismiss even before it has to address the litigation
13 fraud --

14 **MAGISTRATE JUDGE FOSCHIO:** Yeah.

15 **MR. SNYDER:** -- and it may be that when Your Honor
16 or when the Court reads --

17 **MAGISTRATE JUDGE FOSCHIO:** Well --

18 **MR. SNYDER:** -- the motion to dismiss --

19 **MAGISTRATE JUDGE FOSCHIO:** I know. But you have to
20 put yourself in the Court's shoes. You have, as we said, it's
21 an unusual case, it's a very substantial case, to say the
22 least, so fairness considerations become to me even
23 heightened.

24 And -- and the fact is, there are experts out
25 there, whether you like it or not, that -- that tend to

1 line-up on the plaintiff's position.

2 **MR. SNYDER:** I disagree as to the dispositive
3 forensic issues that will be presented.

4 **MAGISTRATE JUDGE FOSCHIO:** Okay.

5 **MR. SNYDER:** I believe that the experts are not
6 dueling experts. They're experts who are speaking the
7 language that is actually going to be irrelevant to the
8 dispositive forensic issues --

9 **MAGISTRATE JUDGE FOSCHIO:** Okay.

10 **MR. SNYDER:** -- that we'll present to the Court.
11 That is to say they will have no experts who can refute the
12 evidence that we have --

13 **MAGISTRATE JUDGE FOSCHIO:** My point is simply this:
14 That the plaintiff has proffered experts who have not caved.
15 I mean, they are --

16 **MR. SNYDER:** Well, many have disappeared.

17 **MAGISTRATE JUDGE FOSCHIO:** Really?

18 **MR. SNYDER:** Yes, Your Honor.

19 **MAGISTRATE JUDGE FOSCHIO:** Like who?

20 **MR. SNYDER:** Aginsky and Osborn are two.

21 **MAGISTRATE JUDGE FOSCHIO:** They disappeared? Like
22 there's a --

23 **MR. SNYDER:** They've abandoned the -- they've
24 abandoned this --

25 **MAGISTRATE JUDGE FOSCHIO:** Like a missing person?

1 **MR. SNYDER:** They've abandoned this plaintiff like
2 six or seven or eight lawyers have as well, as the evidence
3 mounts that this plaintiff is engaged in a fraud.

4 **MAGISTRATE JUDGE FOSCHIO:** Oh, okay. Well, you get
5 the gist of what I'm saying.

6 Thank you for bearing with me. If there's nothing
7 further on behalf of the plaintiff, Mr. Boland?

8 **MR. BOLAND:** Your Honor, I heard from a lot wiser
9 lawyers and judges than I when I was a young lawyer that
10 sometimes the best lawyering to do is say nothing. I'll take
11 that advice.

12 **MAGISTRATE JUDGE FOSCHIO:** Excellent.

13 And for the defendant, Mr. Snyder, anything
14 further?

15 **MR. SNYDER:** No, Your Honor.

16 **MAGISTRATE JUDGE FOSCHIO:** We are adjourned. Have
17 a happy holiday to all.

18 **MR. SNYDER:** You too, Your Honor.

19 (**WHEREUPON**, the proceedings adjourned at 4:06 p.m.)

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CERTIFICATE OF TRANSCRIBER

In accordance with 28, U.S.C., 753(b), I certify that this is a true and correct record of proceedings from the official electronic sound recording of the proceedings in the United States District Court for the Western District of New York before the Honorable Leslie G. Foschio on December 11th, 2011.

S/ Christi A. Macri

Christi A. Macri, FAPR-RMR-CRR-CRI
Official Court Reporter